Office - Supreme Court, U.S.
FILED
SEP 28 1982
ALEXANDER L. STEVAS,
CLERK

82-550

CASE NUMBER _____

UNITED STATES SUPREME COURT

OCTOBER 1982 TERM

SHOP & SAVE FOOD MARKETS, INC.,
PETITIONER

v.

PNEUMO CORPORATION, ABBOTT REALTY COMPANY AND P&C FOOD MARKETS, INC.,
RESPONDENTS

ON PETITION FOR
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT (DOCKET NO. 80-9053)

PETITION FOR CERTIORARI

John L. Primmer (Counsel of Record)
Primmer & Piper
12 Prospect Street
St. Johnsbury, VT 05819
(802) 748-5061

Robert D. Rachlin
Downs Rachlin & Martin
100 Dorset Street
South Burlington, VT 05401
(802) 863-2375

Attorneys for Petitioner

QUESTIONS PRESENTED

1. WHETHER THE IMPOSITION OF PENALTIES OR PRICE DIFFERENTIALS AS PART OF A CONSPIRACY TO FORCE ADHERENCE TO A TYING ARRANGEMENT OR BOYCOTT VIOLATES SECTION 1 OF THE SHERMAN ACT (15 U.S.C. §1).

2. IF SO, WHETHER THE EXACTION OF SUCH PENALTIES OR PRICE DIFFERENTIALS, IN LIEU OF ENFORCEMENT OF THE TYING ARRANGEMENT OR BOYCOTT, SANITIZES THE OTHERWISE ILLEGAL CONDUCT.

TABLE OF CONTENTS

	Page
Questions Presented (Rule 21.1(a))...	i
List of Parties (Rule 21.1(b))....	Cover Page
Table of Contents (Rule 21.1(c))....	iii
Table of Authorities (Rule 21.1(c)).	iv
Reference to Reports of Opinions of Courts below (Rule 21.1(d)).....viii	
Statement of Grounds for Supreme Court Jurisdiction (Rule 21.1(e))....	x
Statutes involved (Rule 21.1(f))...	xi
Statement of Case (Rule 21.1(g), (i) and (j)).....	1
a. Basis for Petition.....	1
b. Background.....	2
c. Facts.....	5
d. Argument.....	14
1. Tying Arrangements.....	17
2. Boycotts.....	24
3. Results of Violations.....	30
4. Justice Department Intervention	41
5. Rule of Reason Analysis...	46
6. Conclusion.....	46
Appendix.....	A1

TABLE OF AUTHORITIES

Table of Statutes and Rules

Statute or Rule	Page
15 U.S.C. §1	i,2,16
15 U.S.C. §15	2
28 U.S.C. §1254	x
28 U.S.C. §1337	2
Fed. R. Civ. P. Rule 56(c)	5

Table of Cases

Name	Page
Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969)	22
American Securit Co. v. Shatterproof Glass Corp., 154 F.Supp. 890 (D.C. Del. 1957), aff'd, 268 F.2d 769 (3rd Cir. 1959), cert. denied, 361 U.S. 902 (1959)	18
Associated Press v. United States, 362 U.S. 1 (1945), aff'g United States v. Associated Press, 52 F.Supp. 362 (S.D. N.Y. 1943)	32,33,35,48
Barber Asphalt Corp. v. LaFera Grecco Contracting Co., 116 F.2d 211 (3rd Cir. 1940)	18
Broadcast Music, Inc. v. C.B.S. 441 U.S. 1 (1979)	32,36,37,46

Capital Temporaries, Inc. of Hartford v. Olsten Corp., 506 F.2d 658 (2d Cir. 1974)..... 45

Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977)..... 43

Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914)..... 26,27,28

Fashion Originators Guild v. F.T.C., 312 U.S. 457 (1941)..... 28,29,47

Hill v. A-T-O, Inc., 535 F.2d 1349 (2d Cir. 1976)..... 23

Illinois Brick Co. v. Illinois, 431 U.S. 720, reh. denied, 434 U.S. 881 (1977)..... 42

Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959).....24, 25,47

National Foam System, Inc. v. Urquhart, 202 F.2d 659 (3rd Cir. 1953)..... 18

Northern Pacific Railway v. United States, 356 U.S. 1 (1958).....31,43,44,47

Osborn v. Sinclair Refining Co., 286 F.2d 832 (4th Cir. 1960), cert. denied, 366 U.S. 963 (1961)..... 40

Oxford Varnish Corp. v. Ault & Wiborg Corp., 83 F.2d 764 (6th cir. 1936)..... 22

Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656 (1961).....24,31,32

Silver v. New York Stock Exchange, 373 U.S. 341, reh. denied, 375 U.S. 870 (1963)..... 24

Smithkline Corp. v. Eli Lilly & Co., 427 F.Supp. 1089 (E.D. Pa. 1976), aff'd, 575 F.2d 1056 (3rd Cir. 1978), cert. denied, 439 U.S. 838..... 20

United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)..... 43

United States v. Associated Press, 52 F.Supp. 362 (S.D. N.Y. 1943), aff'd sub nom. Associated Press v. United States, 326 U.S. 1 (1945).....33,35

United States v. Diebold, Inc., 369 U.S. 654 (1962)..... 5

United States v. General Motors Corp., 384 U.S. 127 (1966)..... 24

United States v. Loew's, Inc., 371 U.S. 38 (1962), aff'g United States v. Loew's, Inc., 189 F.Supp. 373 (S.D. N.Y 1960).....19,21,47

United States v. Loew's, Inc., 189 F.Supp. 373 (S.D. N.Y. 1960), aff'd, United States v. Loew's, Inc., 371 U.S. 38 (1962)..... 19,20,21,22

Waldron V. Cities Service Co., 391 U.S. 253, reh. denied, 393 U.S. 901 (1968)..... 42

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)..... 42

REFERENCE TO REPORTS OF OPINIONS BELOW

Shop & Save Food Markets, Inc., Plaintiff v. Pneumo Corp., Abbott Realty Co. and P & C Food Markets, Inc., Defendants

Docket No. 78-44
(Coffrin, District Judge)

Opinion and Order dated July 21, 1980
Filed July 22, 1980

Not Reported
App. Item 1

Order dated October 17, 1980
Filed October 17, 1980

Not Reported
App. Item 2

Shop & Save Food Markets, Inc., Appellant, v. Pneumo Corp. Abbott Realty Co. and P & C Food Markets, Inc., Appellees

Docket No. 80-9053
No. 20 - August Term, 1981
(Feinberg, Chief Judge, Meskill, Circuit Judge and Palmieri, District Judge (sitting by designation from the Southern District of New York)

Opinion dated January 20, 1982
Filed January 20, 1982
(By Palmieri with Meskill,
in dissent)

Reported at CCH
1982-1 Trade
Cases Par. 64,496
App. Item 3

Opinion dated July 2, 1982
Filed July 2, 1982
(On Rehearing, by Meskill,
with Feinberg in con-
currence)

Reported at 683
F.2d 27
App. Item 4

STATEMENT OF GROUNDS FOR SUPREME COURT JURISDICTION

The Supreme Court has jurisdiction over this Petition under 28 U.S.C. §1254(1) and Rule 17 of the Supreme Court of the United States Revised Rules.

-X-

STATUTES INVOLVED

15 U.S.C. §1

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. §15

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(amended in 1980 to add provision not applicable to this proceeding)

STATEMENT OF CASE

a. Basis for Petition

As discussed in detail in the Argument beginning at page 14, the decision of the United States Court of Appeals for the Second Circuit is appropriate for issuance of a Writ of Certiorari for the following reasons:

1. The decision conflicts with principles established by the United States Supreme Court.

2. The decision conflicts with principles established by other Courts of Appeals, as well as with previous decisions of the Second Circuit.

3. The final decision was issued after rehearing, and represents a reversal of the position taken by the Second Circuit in its initial decision.

4. The decision was reached after intervention by the Antitrust Division

of the United States Department of Justice, which occurred after the Second Circuit's initial decision. In its Amicus Curiae memorandum, the Antitrust Division takes positions fundamentally inconsistent with those formerly prosecuted, vigorously and successfully, by that Division.

b. Background

The Petitioner brought this action in 1978 in the United States District Court for the District of Vermont (the "District Court"). Original jurisdiction was conferred on the District Court by 15 U.S.C. §15 and 28 U.S.C. §1337.

The Petitioner alleged that the Respondents had conspired to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. §1). It alleged

further that as part of such conspiracy, the Respondents sought to impose a tying arrangement on the Petitioner and to force the Petitioner to observe a boycott of the Respondents' competitors, both of which schemes were illegal under Section 1 either as per se violations, or under a rule of reason analysis. The Petitioner alleged further that it had suffered damages as a direct result of such violations.

The District Court (Coffrin, Judge) entered Summary Judgment against the Petitioner, holding that the Respondents had not been successful in imposing a tying arrangement or forcing adherence to a boycott and that any injury suffered by the Petitioner was therefore not antitrust injury.

The Petitioner appealed to the United States Court of Appeals for the

Second Circuit (the "Second Circuit"). On January 20, 1982, the Second Circuit, in an opinion by Palmieri, Judge, (sitting by designation from the Southern District of New York,) with Feinberg, Chief Judge concurring, affirmed the District Court's opinion with respect to the boycott claim and reversed it with respect to the tying claim. Meskill, Judge, dissented from the portion of the opinion reversing the District Court.

The Respondents filed a Petition for Rehearing, which was supported by an Amicus Curiae memorandum filed by the Antitrust Division of the United States Justice Department, pursuant to its recently adopted policy of intervening in private actions. The Petition for Rehearing was granted, and on July 2, 1982, the Second Circuit issued a new

opinion, written by Meskill, Judge, affirming the District Court in all respects.

c. Facts

Since the Petition arises out of an affirmance of summary judgment, there have been no findings of fact entered below. Nevertheless, the initial Complaint and affidavits make allegations and support the drawing of inferences as follows:(1)

In 1970 the Petitioner established a grocery store in Lyndonville, Vermont, in a new shopping center. The location was obtained through Abbott Realty Corp., which was the prime tenant under

(1) In this recitation of facts and inferences to be drawn thereform, the Petitioner obviously states them in the light most favorable to its position, as is warranted by Rule 56(c) of the Federal Rules of Civil Procedure. United States v. Diebold, Inc., 369 U.S. 654 (1962).

a lease with the owner. Abbott was then under common ownership with the Cross Company, the wholesale supplier from which the Petitioner bought substantially all its groceries. The Lyndonville store was designed and constructed for the Petitioner. The Petitioner negotiated the terms of the prime lease with the owner, and had supervision over the entire proceedings. The Petitioner had the full expectation that it would have possession of the premises for the initial 20-year term of the lease, with options to renew for an additional 15 years. However, the Petitioner did not obtain a written sublease, relying instead on its good relationship with Abbott and Cross. The Petitioner saw Abbott as no more than a nominal prime tenant, holding the prime lease for the

sole purpose of providing the financial stability required by the owner.

In short, it was the Petitioner's store.

In 1972, Pneumo acquired Abbott and Cross and for the next several years relations remained cordial.

In 1976 when the Petitioner had the opportunity to lease a new facility in Derby, Vermont, it sought financial backing on the lease from Pneumo. This opportunity arose when another grocery chain (unrelated to the parties) abandoned the facility. At the time there remained 15 years on the original lease, with options to renew for an additional 15 years. After delays, Pneumo offered to take over the lease and sublease it to Petitioner for five years, rather than for the remaining term. It is fair to infer that Pneumo

did so in order to retain control over the location and, among other things, be in a position to force the Petitioner to purchase groceries from Cross. Finding these conditions unacceptable, the Petitioner sought assistance from another source, a competitor of Cross, and obtained the benefit of the full lease term, plus the opportunity to renew through options. In gratitude, Petitioner began purchasing wholesale groceries for that location from that source. Petitioner continued to purchase from Respondents for all of its other locations.

The Petitioner has alleged that the Respondents, upset by Petitioner's course of action, decided to retaliate. At that time, if not before, Respondents entered into an agreement

and conspiracy to unreasonably restrain trade and punish the Petitioner in one or more of several fashions. In particular, Respondents decided to open a P & C store in direct competition with Petitioner. In addition, Respondents considered evicting Petitioner and taking over its Lyndonville location. Respondents also attempted to assure the purchase of groceries by the Petitioner at wholesale from Cross (and thereby to prevent Petitioner from purchasing from other competitors) by conditioning a sublease to the Lyndonville facility on an agreement to purchase from Cross. Respondents conspired to offer a sublease at the then existing rent if the Petitioner's purchases were made from Cross, and at a penalty rent if not. A variation of this coercive

arrangement was the offer to Petitioner of a sliding scale rent reflecting the level of purchases from Cross. Furthermore, Respondents decided to withhold from the Petitioner any renewal options under the sublease even though the prime lease contains a fifteen year renewal period. It is a fair inference that these options were withheld in order to exert further control over Petitioner at the time the initial term of the sublease expired.

In furtherance of this conspiracy the Respondents engaged in numerous overt acts aimed directly at the Petitioner. First, on December 6, 1976, Pneumo told Petitioner it could have a sublease in Lyndonville only if it purchased from Cross. Petitioner was also informed that if it agreed to such purchases its rent would not be

increased. These statements were made during the same conversation in which Pneumo told Petitioner of its plans to open a St. Johnsbury P & C store. Petitioner was stunned by these communications and sought to clarify its position with the Respondents. In subsequent conversations, occurring approximately the same time, Petitioner requested a private label, to avoid having to compete directly against a P & C retail facility under common control with Petitioner's supplier in the supplier's products. This request was refused.

When the Petitioner objected to the purchasing requirement, it was eventually told that it could have a lease, but with a 57.5% base rent increase to $31,500. When Appellant objected to this, it was offered a

sliding scale rent, with rent ranging from the then existing level of $20,000 to $31,500, in inverse proportion to the level of purchases from Cross.

This latter offer was accepted by Petitioner, because it believed it could mitigate the rent increase by purchasing non-Cross labels and thus avoid having to compete with P & C in its own labels. After further discussions, the parties also agreed to the other terms of the sublease. However, when the Petitioner decided to open another facility in St. Johnsbury, the Respondents, in order to prevent this or in retaliation for this decision, withdrew all offers to lease the Lyndonville facility to the Appellant. After being threatened with suit by the Petitioner, the Respondents again offered a sublease to the

Petitioner, but with the 57.5% increase in rent, and without the renewal options. Having no alternative, the Petitioner accepted this offer.

The Petitioner maintains that the conspiracy and agreement among the Respondents continues to this date. On no occasion has the Petitioner been offered a lease on the same terms as would have been available had the Petitioner agreed to purchase its wholesale groceries from Cross or to refrain from purchasing from Cross' competitors. The Respondents will continue to receive the penalty rent until the initial term of the lease expires. At that time they will be in a position to use their prime lease to the Lyndonville store to force additional concessions, or to damage the Petitioner further by eviction.

Allegations supporting the above interpretation, and facts suggesting its complete plausibility, were before the District Court and the Court of Appeals.

d. Argument

On appeal to the Second Circuit the Petitioner argued that the District Court was in error in (i) applying incorrect standards in granting summary judgment; (ii) examining constituent elements of the Respondents' conspiracy, rather than examining the conspiracy as a whole; (iii) denying Petitioner's standing to sue on its boycott claim; and (iv) holding implicitly that the elements of a violation are different in private, as opposed to government enforcement, action. The Petitioner considers those

and other issues to be important subsidiary issues to this litigation, and, if this Petition is granted, the Petitioner will argue those issues in its brief on the merits.(2) The opinion of the Second Circuit does not address those issues, however, because it holds that on the facts alleged by the Petitioner there simply cannot be a violation of Section 1 of the Sherman Act. Accordingly, this Petition addresses only the controlling questions decided by the Second Circuit.

---

(2) The Petitioner has also alleged and briefed the specific components of the violations it claims in this litigation, including the requirements under tying cases that the plaintiff show economic power in the tying product, the involvement of a "not insubstantial" amount of commerce in the tied product, and coercion. These issues also would be addressed by Petitioner in its brief on the merits.

As stated above, those questions are:

1. WHETHER THE IMPOSITION OF PENALTIES OR PRICE DIFFERENTIALS AS PART OF A CONSPIRACY TO FORCE ADHERENCE TO A TYING ARRANGEMENT OR BOYCOTT VIOLATES SECTION 1 OF THE SHERMAN ACT (15 U.S.C. §1).

2. IF SO, WHETHER THE EXACTION OF SUCH PENALTIES OR PRICE DIFFERENTIALS, IN LIEU OF ENFORCEMENT OF THE TYING ARRANGEMENT OR BOYCOTT, SANITIZES THE OTHERWISE ILLEGAL CONDUCT

The District Court did not decide the first of these issues as it affected tying arrangements. It answered the second of the issues in the affirmative, however, holding that since there was no completed tie there was no violation. The District court did not consider whether the use of penalties in attempts

to impose boycotts was illegal, because it held in effect that persons paying those penalties could not be within the target area unless they are persons at whom the boycotts, not the penalties, were specifically aimed.

The Second Circuit affirmed the District Court on the boycott issue without discussion. And, in its second opinion, it upheld the District court on the tying issue, stating "an attempt to force a tie which results only in an agreement to pay a higher price for the tying product is not a tying violation." 683 F.2d 27 at 31.

1. Tying Arrangements

The principle that penalties or price differentials can demonstrate coercion of a purchaser to submit to a tying arrangement has long been

recognized. Among the earliest decisions were certain patent misuse cases, where penalty royalties were extracted for licensing under a tying patent unless the licensee also paid royalties for licensing under tied patents, or where the royalty for the tying patent has been as high as that for the tying and tied patents together. See, American Securit Co. v. Shatterproof Glass Corp., 154 F.Supp. 890 (D.C. Del. 1957), aff'd 268 F.2d 769 (3d Cir. 1959), cert. denied, 361 U.S. 902 (1959); National Foam System, Inc. v. Urquhart, 202 F.2d 659 (3rd Cir. 1953); Barber Asphalt Corp. v. La Fera Grecco Contracting Co., 116 F.2d 211 (3rd Cir. 1940). Although these cases were not decided strictly under Section 1 of the Sherman Act, they applied Sherman Act tying standards in

determining that extension of a patent monopoly through tying arrangements constitutes patent misuse and have on that basis denied the patent owner the right to maintain infringement actions.

This Court dealt with the price differential issue in United States v. Loew's, Inc., 189 F.Supp. 373 (S.D.N.Y 1960), vacated and remanded (to expand scope of injunction), 371 U.S. 38 (1962). In that case the District Court entered a decree enjoining certain "block booking" practices of the defendants in forcing television stations to take unwanted movies in order to obtain desired movies. The District Court found the practices of the defendants to be illegal tying arrangements. The opinion examined several different methods used by the various defendants to force the taking

of unwanted films, including one scheme in which the defendant offered only one price, the minimum package price, and would refuse to complete any transaction at less than the minimum price. The Court characterized this scheme as follows: "[The Defendants] never said 'you must take all 371 or 222 of these films.' They merely said 'you must pay for all 371 or 222 films.'" 189 F.Supp. at 388.(3)

Recognizing that the same result could be achieved by establishing price

(3) The District Court also held that where the price differential between a film offered separately and offered as part of a package was de minimus, there was no violation. 189 F.Supp. at 386. Cf. Smithkline Corp. v. Eli Lilly & Co., 427 F.Supp. 1089 (E.D. Pa. 1976), aff'd on other grounds, 575 F.2d 1056, 1061, n. 3 (3rd Cir. 1978), cert. denied, 439 U.S. 838 (1978), involving a 3% differential.

differentials between the desired film purchased separately and the same film purchased as a package, the District Court enjoined the defendants from

> (C) Entering into any agreement to sell or license the right to exhibit any feature film over any television station in which the differential between the price or fee for such feature film when sold or licensed alone and the price or fee for the same film when sold or licensed with one or more other film [sic] has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films. (Emphasis added.)

189 F.Supp. at 399.

On appeal, this Court affirmed the holding of the District Court that the defendants had engaged in illegal tying arrangements, and strengthened the above provision of the decree by prohibiting any price differential between films offered individually and as part of a package, unless cost justified. 371 U.S. at 54.

The Court allowed to stand another portion of the District Court decree which enjoined the Defendants from "Conditioning or tying, or attempting to condition or tie, the purchase or license of the right to exhibit any feature film over any television station upon the purchase or license of any other film." (Emphasis added.) 189 F.Supp. at 399.

No subsequent opinion of this Court suggests that the vitality of the Loew's opinion has been sapped.

See also Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), and Oxford Varnish Corp. v. Ault & Wibourg Corp., 83 F.2d 764 (6th Cir. 1936), where package pricing or penalties were held illegal under Section 1 of the Sherman Act.

The Second Circuit previously recognized a variation of the package price differential issue. In Hill v. A-T-O Inc., 535 F.2d 1349 (2d Cir. 1976), the defendants offered membership in a buying service which enabled the purchasers, allegedly, to obtain large discounts on certain merchandise. In order to become a member, however, a purchaser was required to buy a vacuum cleaner. The defendants attempted to avoid tying implications by asserting that the membership was given away free with each purchase of a cleaner. The Court responded:

> [W]e believe this point irrelevant for purposes of tie-in analysis. To hold to the contrary would permit escape from the antitrust proscription against illegal tie-ins by the simple device of offering both products as a unit at a single price, while claiming that one of the two is a "free giveaway."

Id. at 1354.

2. Boycotts

This Court has consistently held that group boycotts or concerted refusals to deal are per se illegal under Section 1 of the Sherman Act. United States v. General Motors Corp., 384 U.S. 127 (1966); Silver v. New York Stock Exchange, 373 U.S. 341, reh. denied, 375 U.S. 870 (1963); Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656 (1961); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

As demonstrated by the many cases analyzing group boycotts, the prohibited restraint of trade is not defined by a static model. Rather, the Court has recognized several types of boycotts. For example, in Klor's, Inc. v. Broadway-Hale Stores, Inc., Id., a case involving, as does this case, both

horizontal and vertical aspects, the Court held that a conspiracy in violation of Section 1 of the Sherman Act existed among manufacturers, distributors and retailers either not to sell goods to the plaintiff-retailer or to sell them only at discriminatorily high prices and on highly unfavorable terms. Id. at 209.

The Petitioner was in much the same position as the plaintiff in Klor's, as being the object of a conspiracy among the Respondents to deprive it of a lease or to make it available "only at discriminatorily high prices and on highly unfavorable terms." At the same time, the Petitioner was being coerced into participating in a boycott of the Respondents' wholesale competitors.

It has long been recognized that Section 1 of the Sherman Act prohibits

so-called "secondary boycotts," that is, coercion of one party in order to induce that party to refrain from dealing with a third party. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). In Eastern States, members of associations of retail lumber dealers circulated lists of wholesalers who sold lumber directly to consumers. No overt pressure was exerted upon members to refrain from dealing with the blacklisted wholesalers, nor was there any express agreement not to deal. This Court, however, looked beyond the surface of the activity and analyzed the scheme in the entire context in which it occurred. The Court stated

> When viewed in the light of the history of these associations and the conflict in which they were engaged to keep the retail trade to themselves and to prevent wholesalers from interfering with what they regarded as their rights in such trade there can be but one

> purpose in giving the information in this form to the members of the retail associations of the names of all wholesalers who by their attempt to invade the exclusive territory of the retailers, as they regard it, have been guilty of unfair competitive trade. ... True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealiers to supply the trade which they regard as their own.... [C]irculation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns."

Id. at 608-9. (Emphasis added.)

Thus, the Supreme Court has made it clear that even "low pressure" tactics designed to induce a person to refrain from dealing with a third person violate the antitrust laws. If more direct tactics are employed, namely imposition of a specific penalty, the conduct

should be seen more clearly as a violation. And as indicated in Eastern States, Id., the entire history of the parties' dealings with each other as well as the competitive context surrounding those dealings are relevant in determining whether illegal coercion has occurred.

In the analogous area of Federal Trade Commission Act proceedings, this Court has in the past faithfully applied the general principles laid down in the foregoing cases. In Fashion Originators Guild v. F.T.C., 312 U.S. 457 (1941), as in this case, the prohibited activity involved coercion of parties in order to influence their conduct toward third parties. In that case, the Federal Trade Commission challenged certain practices of an organization of textile manufacturers and retailers in the

ladies' garment industry. Members of the Guild were prohibited from dealing with retailers who purchased ladies' dresses from so-called "style-pirates" who had appropriated original dress designs from Guild members. Id. at 82. Thus, the sanctions applied to fellow retailers were designed with the ultimate object of eradicating third party style pirates.

This Court expressly recognized the broad antitrust implications of the Guild's activities, stating:

> Not only does the plan ... conflict with the principles of the Clayton Act; the findings of the [Federal Trade] commission bring petitioners' combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself .... [The Guild's plan] has both as its necessary tendency and as its purpose and effect the direct suppression of competition ....

Id. at 465.

3. Results of Violations

If it remains illegal to use penalties and price differentials to force tying arrangements or boycotts, the Petitioner indisputably would have a cause of action if it alleged that, by such means, it was coerced by the Respondents into purchasing unwanted products. The present posture of this litigation at this time is attributable solely to the fact that the Petitioner is now paying the penalty instead of making such purchases.

The argument advanced by the Respondents and accepted by the District Court and Second Circuit is, in effect, as follows:

> Per se illegal conduct resulting in injury to the person against whom it is aimed, becomes legal if the conduct does not achieve the most predictable, classic, result. An attempt to tie or force a boycott, which results in direct receipt of a

penalty is "unsuccessful," and therefore legal.

This is much like saying that once the ransom is paid and the hostage released, there has been no kidnapping.

Per se antitrust analysis, by its very definition, examines conduct, not result. As the Court stated in Northern Pacific Railway v. United States, 356 U.S. 1 (1958)

> [T]here are certain agreements or practices which because of their pernicious effects on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they had caused....

Id. at 5.

Similarly in Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1971), the Court stated

> By §1, Congress has made illegal: "Every contract, combination...or conspiracy in restraint of trade or commerce among the several States....Congress having thus prescribed the criteria of the

> prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

Id. at 660.

And in Broadcast Music, Inc. v. C.B.S., 441 U.S. 1 (1979) the Court recognized the extreme nature of per se liability once again in admonishing against the casual and premature creation of new categories of per se violations.

Structuring a scheme to engage in per se illegal conduct in a way that anticipates alternative results (both of which benefit the violator and harm the target) does not change the nature of the conduct. The Supreme Court recognized, in Associated Press v. United States, 326 U.S. 1 (1945), this ability of offenders to pattern their

conspiracy to put them in a "heads we win, tails you lose" position.

In Associated Press , the Court affirmed an opinion of a three judge District Court, written by Judge Learned Hand, which held to be illegal certain by-laws of the Associated Press imposing severe conditions to membership on newspapers who were competitors of existing members. United States v. Associated Press, 52 F.Supp. 362 (S.D. N.Y. 1943), aff'd sub nom. Associated Press v. United States, 326 U.S. 1 (1945). Associated Press had previously been the subject of suits based on restrictive conditions to membership, and had revised its by-laws to provide for two separate procedures for attaining membership. The first procedure, which applied to newspapers that did not compete with existing

members, was simple. It allowed the board of directors of Associated Press simply to grant membership, with no conditions. The second procedure which could be invoked by existing members if the applicant were a competitor, was more onerous. First, it required the applicant to pay to Associated Press 10% of all payments made by the applicant's competitor, since the inception of Associated Press. Second, it required a vote of a majority of all members. Third, it required the applicant to make available to Associated Press all of its news sources on the same terms as they were available to the applicant. In examining the condition of payments, the District Court stated:

> The conditions which they may exact when an applicant secures such a vote are plainly designed in the interest of preventing competition. The first is the payment of ten per cent of all the assessments paid by

> members in the same "field" for a period of over forty years: the payment to be distributed among those who have paid the assessments. This upon its face appears an exaction designed to compensate the applicant's competitors for the loss of their differential advantage, and incidentally to act as a deterrent. ... The evidence proves beyond doubt that, ... the payments as a whole were also designed to compensate competitors for the loss in value of their membership, arising out of the applicant's improved position as a competitor. (Emphasis added.)

52 F.Supp. at 371.

On appeal, this Court affirmed, quoting the above language with approval. 326 U.S. 1, 11 n. 5.

Under this analysis, the Respondents in this case were not failures in their attempt to impose a tie or a boycott. They received the tribute they deemed necessary to allow the Petitioner to escape their tie and boycott and to pressure their anticompetitive edge. Under Associated Press, that too is illegal.

The Respondents and the Justice Department argued below that by recognizing, in its initial decision, a remedy in favor of the Petitioner, the Second Circuit was creating a new category of per se violation in disregard of this Court's warnings in Broadcast Music. Judge Meskill advanced the same proposition both in his dissent and in his majority opinion on the final decision.

What is overlooked by this position is that sustaining the Petitioner's claims does not require creation of a new violation. The principles of tying and boycotts have been long established, and the prohibition against the use of penalties or price differentials in connection with such schemes has also long been recognized as illegal.

Indeed, the requirement of Broadcast Music that per se illegal conduct always, or "almost always" result in a restraint on competition recognizes the possibility that on occasion it may not.

The test, from the Petitioner's standpoint, was whether it was injured as a result of conduct recognized as per se illegal, and not whether the Petitioner might fall within an improbable statistical minority whose injury comes about in a manner that (arguably) does not restrain trade.

Petitioner's contentions are further supported by an examination of the reasons for the non-classic result in this case. To begin with, the Petitioner was up against a conspiracy composed of its landlord, a wholesale supplier, a retail competitor and the company controlling all of them. The

combination of horizontal and vertical overtones of this configuration remove it from pure vertical restraint analysis.

Next, in most cases the "success" of a restraint is measured by the amount of the tied product sold and business diverted from competitors. None is being sold in this case for the following reasons. At the same time the Respondents were seeking to impose their tie, they were also pouring the foundations for a retail grocery store that would compete directly with the Petitioner. The Petitioner therefore faced the nightmarish prospect of being forced not only to purchase all of its wholesale groceries from the Respondents' wholesale arm, but also to compete directly with their retail arm in those same products, including the

wholesaler's private, "Red & White" label. The Petitioner was refused even the ability to obtain its own private label, so that the Respondents' anti-competitive edge at the retail level could have been made less glaring.

The penalty to be exacted for the Petitioner's escape was then offered, and then mitigated through the offer of the sliding scale rental. With no apparent alternative, the Petitioner accepted this offer. A completed tie, and a predictable result!

Had the case reached the court in this posture the legal outcome also would have been entirely predictable. The Respondents did nothing after that to cure their violations, such as offering a lease without a buying requirement, and without a penalty rent. Instead, they revoked their offer of a

lease altogether and threatened to evict the Petitioner if it carried out a proposal to open a new retail location in the Respondents' new territory. This threat made what went before all the more egregious, and as the Second Circuit pointed out in its initial decision, would have amounted to a per se violation if carried out. Osborn v. Sinclair Refining Co., 286 F.2d 832 (4th Cir. 1960), cert. denied, 366 U.S. 963 (1961). When the untenability of this position was pointed out to the Respondents, the lease now in effect, which embodies a penalty, was reoffered. Approximately a year and a half after "negotiations" began, the Petitioner got a lease. The rent increase reflected exactly the amount of the penalty the Respondents sought from the outset as their price to allow escape from their conspiracy.

In short, the Respondents' actions after they had successfully imposed a tie did not purge their violations. It compounded them.

It also cannot be overlooked that it was the Respondents here, not the Petitioner, who established the rules of the game and left the Petitioner with no alternative but to pay the penalty. The Petitioner in fact agreed, under duress, to the Respondents' tying scheme, and lost even that "opportunity" when it decided to open a new store that would compete with the Respondents' new retail store.

4. Justice Department Intervention

The intervention in this case of the Antitrust Division of the Justice Department is significant for two reasons. First, the mere fact of intervention undercuts the efficacy of

the private attorney general concept which has been lauded by this Court for decades as an effective component of antitrust enforcement. Illinois Brick Co. v. Illinois, 431 U.S. 720, reh. denied, 434 U.S. 831 (1977); Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100 (1969); Waldron v. Cities Service Co., 391 U.S. 253, reh. denied, 393 U.S. 901 (1968). The Petitioner in this case as well as nearly all other private litigants, relies on solid principles developed in actions instituted by the Justice Department since the beginning of this century. Its intervention here seems to signal an intent to unwrite a great deal of that precedent.

A second, and equally troubling, significance is the position argued by the Antitrust Division in its Amicus

Curiae memorandum below. That position can be fairly summarized to state that the Antitrust Division proposes to do away with per se analysis in all vertical restraint cases. Its argument relies on this Court's decision in Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977). That case indeed did away with the per se approach in examining territorial restrictions, in the process overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). However, the Court in no way implied that vertical restraints should not be subject to per se analysis. On the contrary it announced explicitly a return to the standard articulated in Northern Pacific Railway Company v. United States, 356 U.S. 28 (1958) for determining whether particular vertical restraints should be

declared per se illegal. Northern Pacific, of course, subjected tying arrangements to the per se rule, so the Antitrust Division's position in this regard is totally insupportable.

By intervening here, the Justice Department has declared to aspiring tying violators that their conduct will be immune if structured as follows. First, in forcing a tie, do not insist upon purchase of the tied product. Instead, establish a price for the tying product that varies according to the amount of tied product purchased, so that the economic equivalent of sales of the tied product will be received regardless of sales volume in the tied product. If a substantial number of purchasers obtain the tied product without complaint, then the scheme will have been successful, at least in the

Second Circuit. See Capital Temporaries, Inc. of Hartford v. Olsten Corp., 506 F.2d 658 (2d Cir. 1974), holding that the absence of complaint indicates the lack of coercion designed to force purchases of the tied product. If on the other hand, a purchaser objects, withdraw the pricing differential, and load the margins from lost sales of the tied product into the price of the tying product.

This scheme will work particularly well in the grocery industry, in which it is customary for wholesalers to obtain control of retail locations which are then leased to, hopefully, complaisant retailers.

In other words, if handled right, tying arrangements will henceforth be immune from enforcement proceedings. And the Justice Department stands ready to

intervene to extend that immunity to defendants in private treble damage actions.

5. Rule of Reason Analysis

The Petitioner alleged both that the Respondents' conduct was per se illegal and that it unreasonably restrained trade. The decisions below have held that the Respondents' conduct was not per se illegal in ruling against the Petitioner. Since the case has not advanced beyond summary judgment, the Petitioner has not yet been given any opportunity to prove that the conspiracy unreasonably restrained trade. Under the doctrine of Broadcast Music, Inc. v. C.B.S., 441 U.S. 1 (1979) it should be given that opportunity.

6. Conclusion

The Petitioner's allegations are quite simple. The Respondents entered

into a conspiracy designed to enhance their competitive edge at the wholesale and retail level and to impose a tying arrangement on Petitioner and force participation in a boycott. These acts when attempted in their classic form have been held per se violations of Section 1 of the Sherman Act, Northern Pacific Railway v. United States, 356 U.S. 1 (1958), Fashion Originators Guild v. F.T.C., 312 U.S. 457 (1941), as well as in a more subtle form, through package or penalty pricing; United States v. Loew's, Inc., 371 U.S. 38 (1962); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Had they resulted in their most obvious goals, little dispute would exist over the outcome of this case. Instead, for the reasons described above, they resulted in actual payment of the

penalty established by the Respondents as the Petitioner's only route of escape. As established in Associated Press v. United States, 326 U.S. 1 (1945), that penalty has the same antitrust character as the successful imposition of a tying arrangement or boycott.

Dated September 27, 1982.

John L. Primmer (Counsel of Record)
Primmer & Piper
12 Prospect Street
St. Johnsbury, VT 05819
(802) 748-5061

Robert D. Rachlin
Downs Rachlin & Martin
100 Dorset Street
So. Burlington, VT 05401
(802) 863-2375

Attorneys for Petitioner

APPENDIX

Item 1 - Opinion and Order of District Court dated July 21, 1980 A2

Item 2 - Order of District Court dated October 17, 1980 A22

Item 3 - Opinion of Second Circuit dated January 20, 1982 A23

Item 4 - Opinion of Second Circuit dated July 2, 1980 (On Rehearing) A36

A 2

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED
'80 JUL 22 AM 10 58
CLERK
BY LCR
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Shop & Save Food Markets, Inc.	:	
	:	Civil Action
v.	:	
	:	File No. 78-44
Pneumo Corporation, Abbott Realty Company, Inc. and P & C Food Markets, Inc.	:	

OPINION AND ORDER

This is a civil action growing out of the parties' negotiations for and the final terms of a sublease of commercial property in Lyndonville, Vermont. Plaintiff has asserted claims under sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act and Vermont's Consumer Fraud Act. Defendants have filed a counterclaim alleging plaintiff procured said sublease from defendant Abbott Realty Company by fraud. Defendants have moved for judgment on the pleadings or for summary judgment on plaintiff's Sherman Act and Clayton Act claims, Fed. R. Civ. P. 12(c), 56(c), and have moved to dismiss plaintiff's state law claim for failure to state a claim on which we can grant relief, Fed. R. Civ. P. 12(b)(6). Plaintiff has moved to amend its complaint. Jurisdiction is grounded on 28 U.S.C. §§ 1332, 1337 and section 4 of the Clayton Act, 15 U.S.C. § 15.

Facts

Plaintiff is a Vermont corporation operating retail grocery stores in St. Johnsbury, Derby and Lyndonville, Vermont. Defendant Pneumo Dynamics Corporation (Pneumo) is a Delaware corporation that owns or controls the other defendants: P & C Food Markets, Inc. (P & C), a New York corporation operating a chain of retail grocery stores in Vermont and New England; Abbott Realty Company (Abbott), a Vermont corporation that manages property on behalf of Pneumo; and Cross Company, a wholesale grocery distributor acquired by Pneumo in 1972.

Prior to the events giving rise to this action, plaintiff was a month-to-month sublessee of the property where it operates its Lyndonville grocery store. The principal lessee was and is Abbott Realty, and plaintiff paid rent to Abbott on a monthly basis from 1970 to 1977. In 1972, Pneumo acquired the assets of Cross Company which included Abbott Realty; Pneumo transferred those assets to P & C in 1977. Prior to the events described below plaintiff purchased substantially all of its wholesale groceries from Cross.

In July of 1976 plaintiff sought from defendants a long term sublease to replace its existing monthly subtenancy under which plaintiff's rent amounted to $20,000 per year. This figure had remained constant since 1970. Plaintiff had determined at the same time to begin purchasing some of its wholesale goods from a competitor of Cross.

Defendant Pneumo responded to this request in December of 1976. Thereafter a protracted course of negotiations ensued, dictated in part by the parties' competing business considerations. Correspondence between plaintiff and Pneumo indicated that Pneumo's subsidiary P & C would be opening a retail grocery store in Lyndonville that would compete with plaintiff's store. In a letter dated December 13, 1976, Bernard Kane on behalf of Pneumo informed plaintiff that it would not offer a lengthy sublease to plaintiff at its current rent because that figure was not an accurate reflection of market value and because Pneumo feared the loss of plaintiff's wholesale purchases from Cross would diminish the total value of its relationship with plaintiff in Lyndonville.

On December 16, 1976, plaintiff wrote to Pneumo that it was unwilling to commit itself to any wholesale purchases from Cross, and Pneumo responded on January 12, 1977, with an offer of a long term sublease at $31,500 per year plus 1.5% of plaintiff's annual sales above $1,500,000.

This was unacceptable to plaintiff who proposed a sublease with rent that would vary according to the amount of wholesale purchases it made from Cross. Pneumo responded on January 24, 1977, with an offer embodying such a plan. Plaintiff found the amount of rent acceptable but remained displeased with the offered lease terms and renewal options. No final agreement was reached on the basis of the January 24 offer, although the parties may have operated under it for a

short period of time. Pneumo ultimately revoked the offer, reiterating its January 12 offer of straight rent at $31,500 per year plus 1.5% of gross sales in excess of $1,500,000. Plaintiff accepted this offer on May 5, 1977, and those remain the basic terms of the parties' contractual relations at this time.

1. Motion to Amend

We granted plaintiff's motion to amend its complaint at the time of hearing on June 2, 1980.

2. Plaintiff's Clayton Act Claim

As drafted, plaintiff's complaint asserted a claim under section 3 of the Clayton Act, 15 U.S.C. § 14. Plaintiff concedes that real estate transactions of the kind at issue in this case do not come within the ambit of section 3. Accordingly, its Clayton Act claim has been withdrawn.

3. Plaintiff's Sherman Act Section 1 Claims

Under section 1 of the Sherman Act, 15 U.S.C. § 1, plaintiff asserts that two forms of defendants' allegedly anticompetitive conduct are per se violations: an illegal tying arrangement and a group boycott or refusal to deal.

a. Illegal Tying Arrangement

An illegal tying arrangement was defined in Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958), as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any

other supplier." Id. at 5-6. See Hill v. A-T-O, Inc., 535 F.2d 1349, 1352-53 (2d Cir. 1976). The evil of tying arrangements that the Sherman Act seeks to eliminate is the shutting out of competition in the tied market and the extension of "pre-existing economic power to new markets for no good justification." American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1137 (2d Cir. 1971), cert. denied, 404 U.S. 1063 (1972).

Defendants' position respecting plaintiff's claim of an illegal tie-in is that there is no agreement in existence that involves two products. Plaintiff has a lease for the Lyndonville retail premises where its store is located and is free to buy wholesale groceries from anyone. Defendants' position is compelling. The sine qua non of an illegal tying arrangement would seem to be the tying arrangement itself. One does not appear on the facts before us. However we might view the arrangements offered and rejected during negotiation of plaintiff's present lease, it remains that those offers never ripened into an agreement. The current agreement does not condition plaintiff's lease on the purchase of any unrelated wholesale groceries, and the offer which plaintiff accepted proposed no alternatives that might have imposed additional purchase conditions.

Plaintiff concedes that its able analysis of the subtleties of the law applicable to illegal tie-ins will not carry the day unless we can find a tie of two separate products. Plaintiff's Memorandum in Response

at 23 (filed December 1, 1978). Plaintiff's observation is correct because the focus of the Sherman Act with respect to tying arrangements is the maintenance of free competition in the market for a tied product. United States v. Loew's, Inc., 371 U.S. 38 (1962); Hill v. A-T-O, Inc. Thus two separate and distinct products must be linked by virtue of the vendor's economic power in the market for the tying product. Coniglio v. Highwood Services, Inc., 495 F.2d 1286, 1289 (2d Cir.), cert. denied, 419 U.S. 1022 (1974). "[T]he plaintiff must establish that he was the unwilling purchaser of the tied product." Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 663 (2d Cir. 1974). We do not reach the issues of economic power and coercion that plaintiff has briefed at length because we fail to discern two products that are linked in this case. As the parties' arrangement stands at this time, defendant exerts no influence over the allegedly tied market, i.e., wholesale groceries. If anything this arrangement has worked to defendants' competitive disadvantage as plaintiff has substantially reduced its wholesale purchases from defendants. Affidavit of James A. Bolanda (filed September 19, 1979, along with defendants' motion for judgment on the pleadings or summary judgment).

Plaintiff's principal argument misapprehends the nature of tying arrangements and the evil at which the Sherman Act aims in prohibiting them. Plaintiff seeks to characterize its present lease as one that embodies a "penalty" rent increase that is part of a completed tying arrangement. Its position is that

during the course of negotiation defendants offered an arrangement that, if accepted, would have tied plaintiff's rent to its wholesale purchases from defendants. Plaintiff refers to this as the "January 24 Restraint," but concedes that it never became effective. Plaintiff's Memorandum in Response at 39-40 (filed December 1, 1978). In all, plaintiff alleges the existence of three tying arrangements. The first allegation misrepresents the course of negotiations between the parties to include an offer of a lease on either of two conditions: the paying of "penalty" rent or the purchase of wholesale goods from defendants. On the record before us we can find no such offer. It appears that defendants made separate offers containing one or the other of these conditions alone, including a sliding scale rent based on plaintiff's purchases from defendants, but there is no evidence, nor is there an offer of any, that would support this first allegation. Plaintiff's contention that this arrangement amounted to a successful tie and is a continuing violation is plainly contradicted by the terms of the lease presently in effect: plaintiff has no option to reduce its rent by purchasing wholesale goods from defendants and plaintiff never selected from such a choice of options in entering into its present arrangement with defendants. The second and third alleged tying arrangements admit their own infirmity. They assert that offers that plaintiff rejected or that defendant withdrew amount to tying arrangements. Neither of these "arrangements" was ever effective as a matter of contract law for lack of acceptance. We

cannot find a tie-in on the basis of what might have been. We have reviewed the deposition testimony as well as the correspondence relevant to those negotiations, Affidavit of George K. McQuade, attachments (filed December 1, 1978), and have concluded that plaintiff accepted no offer from defendants during their negotiations that involved a possible tie-in arrangement. Had plaintiff selected its present arrangement from alternative offers that included the optional choice of a tying arrangement we possibly might have a different situation. Plaintiff had but one choice, however, when it made a conscious decision to pay the rent it presently pays.[1/] Any possibility of a tying arrangement was extinguished at that point regardless of what the parties earlier may have contemplated or what the motive of defendants may have been. It is clear that defendants have substantial economic power in their control of the Lyndonville premises, but on the facts alleged by plaintiff they did not use this power to the disadvantage of competition in the wholesale grocery market. We recognize that we should sparingly accord summary treatment to anti-trust claims, but we cannot ignore the essential elements of those claims. Plaintiff has failed to demonstrate or adequately allege the tying of two different products and we therefore grant defendants' motion for summary judgment on plaintiff's section 1 tying claim.

b. Illegal Boycott or Refusal to Deal

The second of plaintiff's claims under section 1 of the Sherman Act is that defendants conspired to coerce plaintiff not to do business with defendants'

competitor grocery wholesalers. In plaintiff's view, this conspiracy inflicted injury upon it in the form of increased rent as a consequence of plaintiff's refusal to join the conspiracy.

A concerted refusal to deal or group boycott, like an illegal tie-in, is a per se violation of section 1. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); International Railways v. United Brands Co., 532 F.2d 231 (2d Cir.), cert. denied, 429 U.S. 835 (1976). While this much is clear, we are not convinced that defendants' conduct as described by plaintiff falls within the Sherman Act's prohibitions. Plaintiff does not claim it was injured by the alleged conspiracy nor that it or its business were the targets of such a conspiracy. Plaintiff's claim is that defendants acted in concert to coerce plaintiff to join in a boycott of third parties, wholesale competitors of defendants' company Cross. It was not the alleged conspiracy or combination among defendants that plaintiff claims caused its injury; plaintiff claims that it was penalized for refusing to join the defendants' conspiracy against others. The infirmity in plaintiff's claim is that while it asserts injury caused by the alleged conspirators, it does not and cannot assert injury resulting from the alleged conspiracy.

According to the authority plaintiff cites, "to state a claim upon which relief can be granted under . . . section [1], allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961). To be sure, a conspiracy to refuse to deal would show a violation under section 1, but plaintiff cannot show that such a violation injured plaintiff; the most plaintiff can show is that it was injured by other acts of those involved in the alleged conspiracy. The target of the Sherman Act is the illegal combination, not the combiners. That plaintiff was injured by those involved in what it claims is illegal under section 1 does not by itself make out an anti-trust claim. Plaintiff's injury must somehow be caused by that illegality not merely by those guilty of it.

The cases plaintiff cites in support of its position are not to the contrary. In Radiant Burners, the plaintiff claimed that the American Gas Association conspired to deprive it of a market for its gas burners by refusing to grant plaintiff's product a seal of approval and simultaneously refusing to supply gas to unapproved burners.

In Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), the plaintiff was a retail dealer of appliances and electronic goods whose access to certain brands was either foreclosed completely or available only upon discriminatory terms as a result of the defendants' conspiracy. The Supreme Court reversed the lower courts and held that a plaintiff need not demonstrate a public wrong because Congress had determined group boycotts to be forbidden per se. Id. at 211. Nevertheless,

the Court did not go so far as to dispense with the requirement of a private wrong caused by the illegal combination of defendants, and such injury was clearly present in Klor's.

In Associated Press v. United States, 326 U.S. 1 (1945), the government brought suit against the Associated Press claiming that its system of by-laws and membership restrained trade in violation of the Sherman Act. No private plaintiff was awarded damages; the Court merely sustained relief in the form of an injunction against future violations. United States v. General Motors Corp., 384 U.S. 127 (1966), and American Medical Association v. United States, 317 U.S. 519 (1943), are to the same effect. If these cases may be read to exclude the necessity of proving the success of an attempted Sherman Act violation, it is nevertheless in the context of an action for injunction by the United States. The Clayton Act, 15 U.S.C. § 15, does not confer upon private parties a right to sue for damages that is coequal with the government's right to sue for an injunction. Section 15 plainly calls for an injury caused by reason of an antitrust violation before a private party may sue for damages. The undisputed facts of this case indicate that defendants' refusal to deal, if any, did not cause plaintiff's injury, if any. The antitrust laws do not give plaintiff a private right of action for all injuries it has suffered at the hands of those who happen to be involved in a Sherman Act violation. Its rights of action are limited to those injuries that are a material cause of or a substantial

factor in the occurrence of damage. Commerce Tankers Corp. v. National Maritime Union of America, 553 F.2d 793, 800-01 (2d Cir. 1977), cert. denied, 434 U.S. 923 (1977); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972); Billy Baxter, Inc. v. Coca-Cola Company, 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971). Plaintiff does not allege facts nor can we conceive of any that would support such a causal connection and its claim must therefore fail.

In addition, plaintiff's claim must fail because the only "conspiracy" it points to is P & C's determination to purchase wholesale groceries from Cross to the exclusion of other distributors. This "conspiracy" involved no other retailers--having failed to coerce plaintiff to join--and we note that the Sherman Act does not prohibit individual companies from dealing exclusively with other individual companies. "A publisher or manufacturer has the right unilaterally to choose the customers with whom he may deal." Bowen v. New York News, Inc., 522 F.2d 1242, 1254 (2d Cir. 1975), cert. denied, 425 U.S. 936 (1976)(citing United States v. Colgate & Co., 250 U.S. 300 (1919)). The necessary corollary of this proposition is that a retailer may without violating the Sherman Act select the wholesaler with whom it will do business exclusively. A single trader refusing to deal with another trader

does not constitute a group boycott. Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283, 287 (6th Cir.), cert. denied, 375 U.S. 922 (1963).

Again we are aware of our responsibility to exercise care in according summary treatment to antitrust claims. But as with plaintiff's first section 1 claim plaintiff has not alleged facts nor can we conceive of any that would make out a refusal to deal that would entitle it to treble damages under the Sherman Act. We grant defendants' motion for summary judgment on plaintiff's section 1 refusal to deal claim.

4. Plaintiff's Sherman Act Section 2 Claims

Plaintiff's amended complaint alleges that defendants conspired and attempted to monopolize the wholesale and retail gocery business in Lyndonville and St. Johnsbury, Vermont. Plaintiff claims defendants conduct violated section 2 of the Sherman Act. Although plaintiff makes, and the law recognizes, separate claims for an attempt to monopolize and a conspiracy to monopolize, there are common elements of the two claims that we can treat simultaneously.

Unlike actual monopolization, attempt and conspiracy to monopolize are activities that fall short of succeeding in the acquisition of monopoly power. For this reason, section 2 does not proscribe the acts standing alone that are in furtherance of a conspiracy or that constitute an attempt; those acts must combine with the specific intent to do what section 2 forbids, i.e., monopolize.

> Although the primary evil was monopoly, the Act also covered preliminary steps, which, if continued, would lead to it. These may do no harm of themselves; but, if they are initial moves in a plan or scheme which, carried out, will result in monopoly, they are dangerous and the law will nip them in the bud. For this reason conduct falling short of monopoly, is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in the criminal law is known as a "specific intent"; an intent which goes beyond the mere intent to do the act.

United States v. Aluminum Co. of America, 148 F.2d 416, 431-32 (2d Cir. 1945)(Hand, J.). See American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946)("Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are . . . relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition."); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir. 1977), cert. denied, 99 S. Ct. 103 ("specific intent to control prices or destroy competition with respect to a part of commerce (element 1) and predatory conduct directed to accomplishing the unlawful purpose (element 2)"); Sulmeyer v. Coca Cola Co., 515 F.2d 835, 850 (5th Cir. 1975), cert. denied, 424 U.S. 934 (1976)("The offense of attempted monopolization requires both specific intent to accomplish the illegal result . . ., and a dangerous probability of success in that endeavor."). Justice Holmes's formulation in Swift and Co. v. United States, 196 U.S. 375 (1905), is as clear and accurate a statement as there is:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent--for instance, the monopoly-but require further

> acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.

Id. at 396.

Since intent alone even if conclusively proved is not proscribed by section 2, we think it appropriate to begin our analysis of plaintiff's section 2 claims with the alleged acts of defendants, which must combine with such intent, before a violation of the Sherman Act occurs.

Much of the law that the federal courts have generated respecting acts that will support an attempt claim concerns the probability that the attempt would succeed if allowed to go forward. E.g., Janich Bros., Inc.; Sulmeyer. This is often termed "dangerous probability," id., and the parties herein so treat it. But before we reach the question of the dangerousness of any probability we must ascertain the existence of probability. If the means plaintiff asserts as the basis of defendants' attempt to monopolize could not possibly result in a monopoly, there can be no violation, and no need to explore the necessarily subjective realms of "dangerousness" and "intent."

The acts of defendants on which plaintiff bases its section 2 claim are set out in plaintiff's Memorandum in Response at 43 (filed December 1, 1978): (1) defendants' increasing involvement in the retail and wholesale grocery business; (2) the closing down of

a competitor (the Grand Union Store in St. Johnsbury); (3) the penalty rent extracted by defendants from plaintiff; and (4) defendants' ability to take over plaintiff's Lyndonville store location. Before considering these assertions we treat what must be the implicit allegation that the parties' lease negotiations, discussed in reference to plaintiff's section 1 claims, were part of defendants' attempt. The conduct of defendant in allegedly attempting to tie plaintiff's wholesale purchases to its lease was not an act which if successful would have achieved a monopoly for defendants. The most it would have achieved would have been the maintenance of defendants' wholesale market position existing at that time in Lyndonville.[3/] There is no assertion that indicates an attempt by defendants to improve that position in Lyndonville or in St. Johnsbury. Furthermore, plaintiff does not compete with defendants in the wholesale grocery business in either place; it cannot and does not point to an injury to its business or property that would permit it to sue under 15 U.S.C. § 15. Western Geophysical Co. v. Bolt Associates, 584 F.2d 1164, 1175 (2d Cir. 1978), and numerous cases cited therein.

As to plaintiff's allegations respecting the retail grocery market, none of them alone or together could possibly result in defendants' acquiring a monopoly position. The imprecise allegation of defendants' "increasing involvement" in the grocery business does not even begin to suggest conduct that could result in a monopoly. Moreover, "'increasing sales' and 'increasing

market share' are normal business goals, not forbidden by § 2 without other evidence of an intent to monopolize." United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 612 n.1 (1977). The other "evidence" suggested by plaintiff's allegations are either not acts of defendants (closing down of competitor; ability to "take over" plaintiff's Lyndonville location) or immaterial to defendants' participation in the retail grocery market (raising plaintiff's rent).

We hold that none of the facts alleged by plaintiff suggest conduct by defendants that could result in its acquisition of monopoly power in the retail or wholesale grocery business in St. Johnsbury or Lyndonville. Regardless of defendants' intent--and we have serious doubts about the ability of the alleged facts to establish intent--the acts charged by plaintiff are not such that if successful would achieve that which the Sherman Act forbids. Furthermore, as we noted in our discussion of plaintiff's section 1 refusal to deal claim, defendants are not involved in a conspiracy respecting wholesale sales that is forbidden by the Sherman Act. The same reasoning applies to retail sales, and plaintiff has alleged no act that would support its bare assertion that defendants have conspired to take over the retail grocery business; neither do the facts underlying its antitrust claim in general support this claim. We are satisfied on the evidence presently available to us[3/] that a properly instructed jury, giving full weight to plaintiff's evidence, drawing every reasonable inference in its favor, and

subjecting defendants' evidence to a critical eye, could not rationally . . . [find] that plaintiff . . . [is] entitled to any relief." Ambook Enterprises v. Time, Inc., 612 F.2d 604, 611 (2d Cir. 1979)(footnotes omitted), cert. granted, 48 U.S.L.W. 3715. Nevertheless plaintiff strenuously argues that it requires further discovery in connection with its section 2 claim, particularly to determine the degree to which defendants' actions have so far succeeded and are likely to succeed in the future. Because this is an antitrust suit[4/] and because of the seemingly fervent nature of plaintiff's plea we believe plaintiff should be accorded the opportunity to come forward if possible with an offer of proof based on additional evidence to support its section 2 claim with regard to defendants' retail sales. For this purpose the parties may assume, but the court does not decide, that St. Johnsbury/Lyndonville is the relevant market area. Accordingly we reserve decision for ninety days on defendants' summary judgment motion to permit additional discovery with respect to plaintiff's section 2 claim of attempted monopolization of retail sales by the defendants. No later than the end of this period plaintiff shall appropriately indicate to the court the pertinent results of such additional discovery and the manner in which it claims it is relevant to its section 2 claim. Defendants are granted fourteen days thereafter in which to respond.

3. Motion to Dismiss the State Law Claim

Defendants have moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss plaintiff's claim under Vermont's

Consumer Fraud Act, Vt. Stat. Ann. tit. 9, §§ 2451-2462. We reserve decision on this motion pending our final disposition of defendants' motion respecting plaintiff's remaining federal claim under section 2 of the Sherman Act. GMW v. Gibbs, 383 U.S. 715, 726 & n.16 (1966).

Conclusion

We grant defendants' motion for summary judgment as to plaintiff's claims under section 1 of the Sherman Act, 15 U.S.C. § 1, and their motion as to plaintiff's section 2 claim respecting the wholesale grocery business; we reserve decision on defendants' motion for summary judgment as to plaintiff's claim respecting the retail grocery business under section 2 of the Sherman Act, 15 U.S.C. § 2, for a period of ninety days to permit the parties to proceed as above indicated; we reserve decision on plaintiff's state law claim pending decision on defendants' motion for summary judgment under section 2 of the Sherman Act. SO ORDERED.

Dated at Burlington in the District of Vermont, this 21st day of July, 1980.

Albert W. Coffrin
District Judge

Footnotes

1/ Plaintiff asserts that its decision was to choose the lesser of two evils, the far greater one being the obligation to "buy from and then compete directly with, a company with far greater resources, selling to itself, in the identical product." Plaintiff's Memorandum In Response at 33 (filed December 1, 1978). But such an argument ignores entirely the effect on the parties of competing economic and business considerations inherent in virtually all lease renewal negotiations. Any dilemma which plaintiff felt it faced must have resulted at least in part from such factors and the ultimate option available to plaintiff in its business judgment was no different than that of most negotiating prospective tenants: not to enter into the lease if the rent asked is too high or the terms too onerous. Indeed had this come to pass in the instant case plaintiff's claim of injury possibly would have been enhanced.

2/ At that time plaintiff was voluntarily purchasing substantially all of its groceries from defendants. Complaint at 2, ¶10 (filed February 22, 1978).

3/ We have made a thorough examination of the affidavits and exhibits submitted by the parties in support of and in opposition to summary judgment in favor of defendants and a review of the depositions on file.

4/ Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); Hill v. A-T-O, Inc., 535 F.2d 1349 (2d Cir. 1976)(Gurfein, J., concurring).

RECEIVED
OCT 20 1980
DOWNS, RACHLIN & MARTIN
BURLINGTON

A 22

AO 58 (Rev. 8/82)

United States District Court

FOR THE

DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED
10-17-80
BY
DEPUTY CLERK

Shop & Save Food Markets, Inc.

vs.

Pneumo Corporation, Abbot Realty Company, Inc. and P & C Food Markets, Inc.

CIVIL ACTION FILE NO. 78-44

JUDGMENT

This action came on for ~~trial~~ hearing before the Court, Honorable Albert W. Coffrin, United States District Judge, presiding, and the issues having been duly ~~tried~~ heard and a decision having been duly rendered.

It is Ordered and Adjudged Defendants Motion for Summary Judgment is granted as to all claims asserted in plaintiff's complaint with the exception of the state law claim aserted under the Vermont Consumer Fraud Act, 9 V.S.A. Sec 2451, et seq.

Plaintiff's claim brought under the Vermont Consumer Fraud Act is dismissed without prujudice.

Defendants' Counterclaim is not extinguished pending appeal.

Dated at Burlington, in the District of Vermont, this 17th day of October, 19 80.

LEONARD W. LAFAYETTE
Clerk of Court

BY: Mary William Wallace
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 20—August Term, 1981

(Argued: October 9, 1981 Decided: January 20, 1982)

Docket No. 80-9053

SHOP & SAVE FOOD MARKETS, INC.,

Plaintiff-Appellant,

—against—

PNEUMO CORPORATION, ABBOTT REALTY COMPANY, and P & C FOOD MARKETS, INC.,

Defendants-Appellees.

Before:

FEINBERG, MESKILL, *Circuit Judges,*
and PALMIERI, *District Judge.**

Appeal from a judgment of the United States District Court for the District of Vermont (Albert W. Coffrin, *J.*) granting summary judgment for the defendant in an action seeking damages under section 1 of the Sherman Act (15 U.S.C. § 1).

Affirmed in part and reversed and remanded in part.

* Hon. Edmund L. Palmieri, Senior United States District Judge for the Southern District of New York, sitting by designation.

JOHN L. PRIMMER, St. Johnsbury, Vt. (Downs Rachlin & Martin, St. Johnsbury, Vt., Robert D. Rachlin, Downs Rachlin & Martin, St. Johnsbury, Vt.), *for Plaintiff-Appellant*.

LESLIE W. JACOBS, Cleveland, Ohio (Thompson, Hine & Flory, Cleveland, Ohio, Charles L. Freed, Thompson, Hine & Flory, Cleveland, Ohio, Joseph E. Frank, Paul, Frank & Collins, Inc., Burlington, Vermont, Francis D. Price, Jr., P & C Food Markets, Inc., Syracuse, N.Y., of Counsel), *for Defendants-Appellees*.

PALMIERI, *District Judge:*

The plaintiff Shop & Save, a Vermont corporation, operates retail grocery stores in St. Johnsbury, Derby and Lyndonville, Vermont. The defendant Pneumo Dynamics Corporation (Pneumo), a Delaware corporation, owns or controls the other defendants: P & C Food Markets, Inc. (P & C), a New York corporation operating a chain of retail grocery stores in Vermont and elsewhere; Cross Company, a wholesale grocery distributor acquired by Pneumo in 1972; and Abbott Realty Company (Abbott), a Vermont Corporation that manages property on behalf of Pneumo, which was acquired with Cross in 1972.

Prior to the events giving rise to the instant controversy, plaintiff purchased substantially all of its groceries from Cross. It had also been a month-to-month sublessee of the property where it operates its Lyndonville grocery store from 1970 to 1977, paying a rental of $20,000 per year. The principal lessee was and is Abbott Realty, whose assets were transferred to P & C by Pneumo in 1977.

In July 1976 plaintiff sought from defendants a long-term sublease with renewal options. At the same time, it began to purchase a portion of its wholesale groceries from a competitor of Cross. Prolonged negotiations ensued until, ten

months later in May 1977, a long-term sublease was agreed to at $31,500 per year plus 1.5 per cent of plaintiff's annual sales above $1,500,000.

At the initial stages of negotiations, Pneumo informed plaintiff that it would not offer a lengthy sublease at the month-to-month rate because that figure did not reflect current market value and it feared that the loss of plaintiff's wholesale purchases from Cross would diminish the total value of its relationship with plaintiff in Lyndonville. It also became clear from the correspondence between the parties that Pneumo's subsidiary P & C would be opening a competing retail grocery store in Lyndonville.

When plaintiff indicated that it did not wish to commit itself to purchases from Cross, Pneumo responded with an offer of a long-term sublease at the terms finally agreed to in May 1977. Prior to this final agreement, however, several offers and counteroffers were considered and may have been operated under for a short period of time. Among these was an offer by Pneumo that rent vary from $20,000 to $31,500 per year according to the amount of groceries purchased from Cross. Plaintiff found the rent formula acceptable ("we have no alternative but to accept") but was not satisfied with the lease terms and renewal options offered by Pneumo. Subsequently, Pneumo revoked its variable rent offer, and reiterated its flat rent offer upon which terms the parties finally agreed.

ISSUES PRESENTED

Appellant claims that the district court erred in granting summary judgment for defendants on the two section 1 Sherman Act violations it alleged: 1) a group boycott or concerted refusal to deal; and 2) a tying arrangement.[1]

Summary judgment is useful as a "procedural weapon to

[1] Although the plaintiff asserted other federal claims as well as claims under Vermont statutes, the parties agree that the present posture of the case makes it unnecessary to examine them.

pierce sham claims and resolve actions where the facts are undisputed." *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 278 (2d Cir. 1967); *aff'g district court on remand*, 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). It is often, however, "too blunt a weapon with which to win the day, particularly where . . . complicated issues of fact must be resolved in order to deal adequately with difficult questions of law which remain in the case." *Miller v. General Outdoor Advertising Co.*, 337 F.2d 944, 948 (2d Cir. 1964). This is particularly true in the case of antitrust litigation, *see Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), although in the proper case summary judgment may be granted, *see Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 667 (2d Cir. 1974); *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286, 1292-93 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974). Whether or not a material fact is in dispute, so as to preclude summary judgment, is a "matter of informed and properly reasoned judgment" as the law provides "no magical talisman or compass [to] serve as an unerring guide" in this determination. *American Manufacturers Mutual Insurance Co., supra* at 279. If a material issue of fact does exist, the court may not grant summary judgment unless, assuming all facts alleged by plaintiff, and the reasonable inferences to be drawn thereupon, to be true, it finds that the law does not recognize plaintiff's claim for relief.

We are satisfied that Judge Coffrin's thorough opinion properly applied the above standards to the claims before him on the issue of a group boycott or concerted refusal to deal. We must reverse and remand, however, on the issue of whether an illegal "tying arrangement" existed since we believe the grant of summary judgment by the lower court was premised on a too limited view of the types of acts which may satisfy the "tying" element of this section 1 violation.

DISCUSSION

The Supreme Court has defined an illegal tying arrangement as "an agreement by a party to sell one product but

only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6 (1958). A tying arrangement will be *per se* illegal, and thus prohibited without proof of *unreasonable* anti-competitive effect, if in addition to a "tie" of two distinct products it is demonstrated that: defendants possess sufficient economic power in the tying market to coerce the purchase of the tied product; actual coercion to purchase the tied product was employed; anticompetitive effects result in the tied market; and a noninsubstantial amount of interstate commerce is involved in the tied market. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *United States v. Loew's Inc.*, 371 U.S. 38 (1962); *Northern Pacific Railway Co., supra; Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *International Salt Co., Inc. v. United States*, 332 U.S. 392 (1947); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56-57 (2d Cir. 1980); *Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1352-55 (2d Cir. 1976); *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 661-63 (2d Cir. 1974); *Coniglio, supra*, at 1289.

As stated in *Northern Pacific Railway Co., supra*, at 6:

> "Where [tying] conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products." (footnote omitted)

The inherently pernicious effects of tying arrangements are thus deemed to require "*per se* illegal" treatment.

Judge Coffrin found it unnecessary to analyze each element

of a successful tying claim because he thought there was a failure of any allegations of the most basic element—a "tie":

> "We do not reach the issues of economic power and coercion that plaintiff has briefed at length because we fail to discern two products that are linked in this case. As the parties' arrangement stands at this time, defendant exerts no influence over the allegedly tied market, *i.e.* wholesale groceries. . . .
>
> ". . . . We cannot find a tie-in on the basis of what might have been. . . . Any possibility of a tying arrangement was extinguished [when a non-tying agreement was reached] regardless of what the parties earlier may have contemplated or what the motive of defendants may have been." *Opinion and Order of the District Court*, July 22, 1980, at 5-6.

Judge Coffrin thereupon granted summary judgment for defendants finding the absence of a successful tie, despite plaintiff's allegations that it was coerced into accepting a "penalty rent" in lieu of a "leasehold-grocery" package.

We find that plaintiff's allegations of fact, and the inferences to be drawn therefrom, would satisfy the requirement of a tie if a substantial "penalty" were indeed forced upon plaintiff in a manner prohibited by section 1 of the Sherman Act. While a prototypical tie is demonstrated by the embodiment of two distinct products in a final agreement, we find that an unsuccessful tie which results in a price penalty for the single item agreed upon satisfies the tying requirement as well.

A price penalty, if high enough, has as much anticompetitive effect as a traditional tie-in. This case potentially demonstrates how a penalty rent could be used to achieve the effects of a tie-in. If we assume that the penalty rent is high,[2] then Shop & Save will be forced to pass the increment

[2] Whether the rent charged is in fact a penalty—that is, whether it is significantly higher than the fair market value of the property—is an issue to be determined by the district court on remand, as we indicate below.

on to its customers. The higher prices encountered at Shop & Save's Lyndonville store will influence customers to do their shopping elsewhere, perhaps at the store run by defendant's subsidiary, P & C. If we were to further assume that mainly Cross products were sold in P & C stores, then this would, in turn, give the Cross products a competitive edge that is due not to their intrinsic worth, but to the economic clout exerted by Pneumo, as lessor of appellant's grocery store. This arrangement would then have the deleterious effect described by the Supreme Court in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6 (1958): "[Tying arrangements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market." The ability of certain competitors to disguise tie-ins should not be allowed to thwart the important policies embodied in the Sherman Act. *Cf. Hill v. A-T-O, Inc.*, 535 F.2d 1349 (2d Cir. 1976) (giving free memberships in buying clubs only to vacuum cleaner purchasers may violate the anti-tying statute); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961) (cancellation of lease violative of tie-in statute upon proof that lease was cancelled for lessee's refusal to purchase products from lessor).

Nothing in the Supreme Court's decisions militates against[1]

---

[1] Though the Court has stated the definition of a tying arrangement as an agreement to tie two distinct products together, *see Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6 (1958), we find nothing in the language employed by the Court to suggest that this definition is exclusive. Rather, the Court's enunciations have gone no further than to decide the cases before it, which have all, to date, included allegations of a tying agreement. *See, e.g., id.* at 5 ("For our purposes a tying arrangement may be defined. . . .").

The possibility that the issue before us might arise can be perceived in the Court's decision in *Northern Pacific Railway Co., id.* at 6 n.4 (emphasis added):

> "Of course, where the buyer is *free to take either product by itself* there is no tying problem even though the seller may also offer the two items as a unit at a single price."

It should also be noted that many of the lower court cases, relied upon by

or compels[4] a finding that a disguised tie-in can violate the Sherman Act. Yet the logical conclusion to draw, based on the policy prohibiting tying arrangements, is that the pernicious effects of a tie sought to be eradicated is the anticompetitive coercion of a party to take that which he does not seek because of the market power exerted by another by virtue of the latter's control over the tying product's market.

Where, on a motion for summary judgment, sufficient facts are alleged to permit reasonable inferences that a tying arrangement was sought to be "forced" upon a plaintiff and, although not finally agreed to, the resulting price for the single tying product reflected a significant penalty extracted to avoid purchase of the tied product, the plaintiff has stated a sufficient case on this issue to have it presented for trial. Since we find that the record before the trial judge permitted such inferences, thus presenting a genuine issue of fact which precludes summary judgment, we reverse and remand for proceedings consistent with this opinion.

We suggest, however, that in the interest of judicial econ-

---

appellee for the proposition that two products are required for a § 1 violation to occur, do not deal with that point as a dispositive issue. For example, the issue in *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974), was whether the appellant had been coerced to buy a product he did not want. We do not dispense with the requirement of coercion; rather, we remand to the district court for determination of whether Shop & Save was coerced to pay this increased rent. Similarly, *Yentsch v. Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980), was decided on the narrow issue of whether the seller of the tying products had "sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product." *Id.* at 57, 58-59.

[4] The remedial decree in *United States v. Loew's, Inc.*, 189 F. Supp. 373 (S.D.N.Y. 1960), *vacated and remanded*, 371 U.S. 38 (1962), does not compel our decision. In *Loew's*, the court found a tying agreement and its remedial decree, as strengthened by the Supreme Court, forebade *any* price differential between the products offered individually and as part of a package, unless cost justified. *Id.*, 189 F. Supp. at 399, 371 U.S. at 54-55. This court has previously warned against relying on the remedial decree in *Loew's* as a basis for determining the elements necessary for proof of an illegal tie. *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1136-37 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). We reaffirm that decision today and the reasoning set forth therein.

omy the district court first consider for trial any or all of the three prongs to the test enunciated herein: 1) whether the defendants were seeking to tie the leasehold with a purchase of wholesale groceries; 2) whether the agreed upon rent embodied a significant penalty; and 3) whether such penalty was the result of anticompetitive coercion exerted by defendants.[5] The determination of these issues is left to the trier of fact's reasoned judgment. We set forth the following guidelines, however, for consideration of these issues.

The first decision—whether defendants sought a tying arrangement—should be based upon an assessment of the negotiation proposals actually made, including the inferences to be drawn from the course of negotiations, which would establish whether the defendants did seek plaintiff's agreement to a "package deal."

The second decision—whether a significant penalty resulted—should rest upon such considerations as the fair market value of the leasehold and the special additional value when obtained by a month-to-month lessee already in possession, *e.g.*, avoidance of moving expenses, the cost of business suspension, and the expenses of installation at a new site. We recognize that the determination of whether, and to what extent, a penalty rent was exacted cannot be made with mathematical certainty in the immediate case. In light of the policy embraced in the Sherman Act, as well as the treble damages authorized by it, we find that a section 1 tying violation will exist only if a significant penalty price for the tying item alone has been exacted. *Cf. SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089, 1110-14 (E.D. Pa. 1976), *aff'd on other grounds*, 575 F.2d 1056, (3d Cir.), *cert. denied*, 439 U.S. 838 (1978) (no illegal tie was found to

---

[5] The cases cited by the parties from other circuits are not inconsistent with the rule herein enunciated. *United States v. Westinghouse Electric Corp.*, 471 F. Supp. 532, 544-45 (N.D. Cal. 1978); *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089, 1110-14 (E.D. Pa. 1976), *aff'd on other grounds*, 575 F.2d 1056, 1061-62 n.3 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

exist where a 3% "bonus rebate" on the tying product was conditioned on the purchase of the tied product, since the plaintiff was "free to take either product by itself").

The final decision—whether such a penalty was the result of anticompetitive coercion—should be resolved on the basis of this circuit's precedents on the issue. *See, e.g., Hill, supra* at 1355; *Capital Temporaries, Inc., supra* at 661-63; *American Manufacturers Mutual Insurance Co., supra* at 1136-37.*

If, after trial, it were found that any of the above elements were not proven by plaintiffs, no violation of section 1 of the Sherman Act would have occurred.†

We therefore reverse and remand the district court's grant of summary judgment on the tying claim, and affirm in all other respects the decision below.

MESKILL, *Circuit Judge (Concurring in part and dissenting in part):*

Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . . , or conspiracy, in restraint of

---

* As stated by this court:

"Tying arrangements are abhorred by the courts primarily because they foreclose a substantial quantity of business to competitors and extend pre-existing economic power to new markets for no good justification. . . . Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie. To adopt [the position that any package offer is illegal] would subject businesses to threats of antitrust sanctions whenever they tried by bravado to buttress a sagging market position by initially offering small quantities of desired goods at high prices, in hopes of eliciting a large order without further negotiation. Such bartering ploys are not generally the concern of antitrust laws."

American Manufacturers Mutual Insurance Co., supra at 1137.

† A similar suggestion was made by this court in *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272 (2d Cir. 1967), and followed by the district court on remand. The result was a proper dismissal of the case after only a three day trial. *See id.*, 446 F.2d 1131, 1133 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). If, in his assessment of the posture of the case, Judge Coffrin finds it prudent to submit separately for trial any or all of the issues enunciated herein, we believe that a proper resolution of this case may be more expeditiously reached.

trade. . . ." 15 U.S.C. § 1 (1976). However, since *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911), it has been recognized that only unreasonable restraints of trade are prohibited. In evaluating conduct under section 1, the Supreme Court "has held that certain agreements or practices are so 'plainly anticompetitive,' . . . and so often 'lack . . . any redeeming virtue,' . . . that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases." *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 8 (1979) (citations omitted). One of the types of conduct which have been held to be illegal *per se* is the tying arrangement. *International Salt Co.* v. *United States*, 332 U.S. 392 (1947).

"[T]he vice of tying agreements lies in the use of economic power in [the tying] market to restrict competition on the merits in [the tied market]." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 11 (1958); *see Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 605 (1953). Therefore, as the Supreme Court and this Circuit have held, to prove a tying violation a plaintiff must establish, *inter alia*, the existence of two separate and distinct products, *see Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 5-6; *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d 1286, 1289 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974), that he was actually coerced by the seller into agreeing to buy the tied product, *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d 658, 662-63 (2d Cir. 1974); *Hill* v. *A-T-O, Inc.*, 535 F.2d 1349, 1355 (2d Cir. 1976), or at least into agreeing not to purchase the tied product from another, *Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 5-6, and that the illegal tying arrangement resulted in the actual foreclosure of competition in the tied product market, *id.* at 6; *International Salt Co.* v. *United States*, 332 U.S. at 396; *Yentsch* v. *Texaco, Inc.*, 630 F.2d 46, 58 (2d Cir. 1980); *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d at 1292. An attempt to force a tie which results only in an agreement to pay a higher price for the tying product is not, by itself, a tying violation.

Plaintiff has not agreed to buy the tied product from defendant or to refrain from purchasing the tied product from another.

The majority asserts, nevertheless, that the exaction of a penalty price for the tying product has as much anticompetitive effect in the tied market as a traditional tie-in and, therefore, should be treated as the functional equivalent of a tying arrangement. The sole support for this proposition is the claim that, in the present case, it is conceivable that because Shop & Save had to pay a higher price for the tying product, it will be forced to raise its retail grocery prices which will in turn lead to an increase in P & C's retail market share and to an increase in Cross' share of the wholesale grocery market.

I do not believe that *per se* rules should be expanded merely because one hypothetical situation can be perceived in which an anticompetitive effect could possibly result. The Supreme Court has stated that in deciding whether to classify conduct as *per se* illegal,

> our inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive".

Broadcast Music, Inc. v. *CBS*, 441 U.S. at 19-20. The majority has not indicated, nor can I discern, a connection between the tying and the tied markets from which to conclude that the exaction of a penalty price for the tying product "always or almost always tend[s] to restrict competition and decrease output" in the tied market.

The lack of a definite nexus between the tying and the tied markets can be illustrated by the present case. For example, rather than raise its retail prices and risk a loss in market

share, Shop & Save may cut its other costs of operation or may find a new supplier who offers wholesale groceries at lower prices. Furthermore, Shop & Save may absorb the increased cost of the tying product by maintaining prices and cutting its profit margin. Even if Shop & Save is forced to raise its prices it will not necessarily lose customers. Shop & Save may be able to maintain its customer base through non-price competition. Finally, any loss in Shop & Save's market share will not necessarily result in the restriction of competition in the wholesale grocery market. Other retail stores who do not purchase wholesale from Cross may acquire Shop & Save's lost market share.

Thus, as is evident, the anticompetitive effect perceived by the majority is too attenuated and too speculative properly to serve as a basis for expanding the definition of "tying arrangement." Therefore, I would confine the tying label to cases where the buyer was the "unwilling purchaser of the tied product[.]" *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d at 663, or where he actually agreed not to purchase the tied product from the seller's competitors, *Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 5-6.

In deciding whether to invoke the *per se* rule, we must be cognizant of the teachings of the Supreme Court that "easy labels do not always supply ready answers[.]" *Broadcast Music, Inc.* v. *CBS*, 441 U.S. at 8, and that "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act[.]" *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972). Accordingly, as we recently noted, the expansion of *per se* rules should be approached with great caution. *Copy-Data Systems, Inc.* v. *Toshiba America, Inc.*, slip op. 169, 179 (2d Cir. Nov. 2, 1981). The alleged unlawful conduct may well give rise to a cause of action. However, it does not constitute an unlawful tying arrangement, a group boycott or a concerted refusal to deal. Therefore, I disagree with that portion of Judge Palmieri's opinion that holds otherwise. I would affirm Judge Coffrin's decision in its entirety.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 20—August Term, 1981

(Argued October 9, 1981 Decided January 20, 1982)

(On Rehearing Decided July 2, 1982)

Docket No. 80-9053

SHOP & SAVE FOOD MARKETS, INC.,

Plaintiff-Appellant,

—v.—

PNEUMO CORPORATION, ABBOTT REALTY COMPANY, and P & C FOOD MARKETS, INC.,

Defendants-Appellees.

Before:

FEINBERG, *Chief Judge*, MESKILL, *Circuit Judge*, and PALMIERI, *District Judge.**

* Hon. Edmund L. Palmieri, United States District Judge for the Southern District of New York, sitting by designation.

On rehearing of an appeal from a judgment of the United States District Court for the District of Vermont, Albert W. Coffrin, *Judge*, granting summary judgment for defendants in an action asserting violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).

Affirmed. Chief Judge Feinberg concurs in a separate opinion.

(JOHN L. PRIMMER, St. Johnsbury, Vermont, Robert D. Rachlin, Downs Rachlin & Martin, St. Johnsbury, Vermont, of counsel), *for Plaintiff-Appellant.*

(LESLIE W. JACOBS, Cleveland, Ohio, Charles L. Freed, Thompson, Hine & Flory, Cleveland, Ohio, Joseph E. Frank, Paul, Frank & Collins, Inc., Burlington, Vermont, Francis D. Price, Jr., P & C Food Markets, Inc., Syracuse, New York, of counsel), *for Defendants-Appellees.*

(WILLIAM F. BAXTER, Assistant Attorney General, Robert B. Nicholson, George Edelstein, Department of Justice, Washington, D.C., of counsel), *for Amicus Curiae United States.*

MESKILL, *Circuit Judge*:

Rehearing has been granted. The opinion filed on January 20, 1982, slip op. 883, is withdrawn and the following is substituted therefor.

Shop & Save Food Markets, Inc. (Shop & Save) appeals from a judgment of the United States District Court for the District of Vermont, Albert W. Coffrin, *Judge*, granting summary judgment for defendants Pneumo Corporation (Pneumo), Abbott Realty Company (Abbott) and P&C Food Markets, Inc. (P&C), in an action asserting violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).[1] For the reasons set forth below, we affirm the judgment of the district court.

I

Shop & Save, a Vermont corporation, operates retail grocery stores in St. Johnsbury, Derby and Lyndonville, Vermont. Pneumo, a Delaware corporation, owns or controls the other defendants: P&C, a New York corporation which operates a chain of retail grocery stores in New England; and Abbott, a Vermont corporation, which manages property for Pneumo. Pneumo acquired Abbott and Cross Company (Cross), a wholesale grocery distributor, in 1972.

Prior to the events giving rise to this action, Shop & Save purchased virtually all of its groceries from Cross. From 1970 to 1977 Shop & Save subleased from Abbott the property where it operates its Lyndonville grocery store, paying a rental of $20,000 per year. Abbott's assets were transferred to P&C in 1977.

In July 1976, Shop & Save sought from Pneumo a long-term sublease with renewal options for the Lyndon-

[1] Although Shop & Save also asserted claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, Section 3 of the Clayton Act, 15 U.S.C. § 14, and a claim under the Vermont Consumer Fraud Act, Vt. Stat. Ann. tit. 9 §§ 2451 *et seq.*, Shop & Save does not appeal from the grant of summary judgment for the defendants on these federal claims and the dismissal of the state claim.

ville property. Thereafter, a protracted course of negotiations ensued, dictated in part by the parties' competing business considerations. During this time, Shop & Save began to purchase a portion of its wholesale groceries from a competitor of Cross. Further, correspondence between the parties indicated that P&C would be opening a competing grocery store in Lyndonville.

Initially, Pneumo responded to Shop & Save's request by offering to provide a long-term lease if Shop & Save agreed to continue to buy groceries from Cross. When Shop & Save refused to commit itself to purchases from Cross, Pneumo responded that it would not offer a lengthy sublease at the month-to-month rate because that figure was "far below" current "fair rental values." Pneumo stated that if it had to risk the loss of Shop & Save's wholesale purchases from Cross, it wanted "compensation." Pneumo repeated its offer to provide a long-term lease if Shop & Save agreed to continue its purchases from Cross.

On December 16, 1976, Shop & Save reiterated to Pneumo that it was unwilling to commit itself to any wholesale purchases from Cross. Pneumo responded on January 12, 1977, with an offer of a long-term sublease at $31,500 per year plus 1.5 percent of Shop & Save's annual sales above $1,500,000. Thereafter, several offers and counteroffers were considered by the parties. Among these was an offer by Pneumo on January 24, 1977 that rent vary from $20,000 to $31,500 per year depending upon the amount of groceries purchased from Cross.[2]

---

[2] Shop & Save alleged in its complaint that it had accepted Pneumo's January 24 offer but that in April 1977, before a sublease embodying these terms was signed, Pneumo revoked the offer. Shop & Save claimed that in the interim, it had purchased groceries from Cross with the understanding that the January 24 agreement was in effect. However, Shop & Save alleges no injury from this conduct. Accord-

Shop & Save found the rental formula acceptable but was not satisfied with the lease term and renewal options. Accordingly, no final agreement was reached on the basis of the January 24 offer. Pneumo ultimately revoked its variable rent offer, and reiterated its flat rent offer, which Shop & Save accepted on May 5, 1977.

On February 21, 1978, Shop & Save filed a complaint charging, *inter alia*,[3] that defendants had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Defendants moved for summary judgment on September 19, 1978. In opposing this motion, Shop & Save argued that it was forced to pay defendants a "penalty" rent for the Lyndonville property because it refused to purchase its wholesale groceries from Cross, and that defendants' conduct constituted a tying arrangement and a group boycott or concerted refusal to deal, all of which are *per se* unlawful.

The district court, on July 21, 1980, granted summary judgment for the defendants on Shop & Save's Section 1 Sherman Act claims. Judge Coffrin found that defendants' alleged conduct did not constitute a group boycott or a concerted refusal to deal because the only relevant conduct which Shop & Save "point[ed] to [was] P & C's determination to purchase wholesale groceries from Cross to the exclusion of other distributors. This [conduct] involved no other retailers—having failed to coerce [Shop & Save] to join—and we note that the Sherman Act does not prohibit individual companies from dealing exclusively with other individual companies." J. App. at 223. The district court found in the alternative that even if defendants had conspired to coerce Shop & Save to agree

---

ingly, we need not decide whether an unlawful tying arrangement existed during this period.

3 *See* note 1, *supra*.

not to purchase wholesale groceries from Cross' competitors, Shop & Save had failed to allege an injury that was causally related to a group boycott or concerted refusal to deal. The district court also found that the alleged conduct did not constitute an illegal tying arrangement because there was no agreement in existence that involved two products. Shop & Save had acquired a lease for the Lyndonville premises and was free to purchase its wholesale groceries from any supplier.

II

The narrow issues presented on appeal are whether the district court erred in holding that defendants' alleged conduct did not constitute a *per se* illegal group boycott or concerted refusal to deal, or a *per se* illegal tying arrangement. For the reasons set forth in Judge Coffrin's thorough opinion, J. App. at 212-231, we affirm the grant of summary judgment on Shop & Save's group boycott or concerted refusal to deal claim. We also agree with the district court that defendants' alleged conduct does not constitute an illegal tying arrangement.

"[T]he vice of tying agreements lies in the use of economic power in [the tying] market to restrict competition on the merits in [the tied market]." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 11 (1958); *see Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 605 (1953). Therefore, as the Supreme Court and this Circuit have held, to prove a tying violation a plaintiff must establish, *inter alia*, the existence of two separate and distinct products, *see Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 5-6; *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d 1286, 1289 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974), that he was actually

coerced by the seller into agreeing to buy the tied product, *Unijax, Inc.* v. *Champion International, Inc.*, slip op. 3413 at 3426-27 (2d Cir. June 21, 1982); *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d 658, 662-63 (2d Cir. 1974); *Hill* v. *A-T-O, Inc.*, 535 F.2d 1349, 1355 (2d Cir. 1976), or at least into agreeing not to purchase the tied product from another, *Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 5-6, and that the illegal tying arrangement resulted in the actual foreclosure of competition in the tied product market, *id.* at 6; *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947); *Yentsch* v. *Texaco, Inc.*, 630 F.2d 46, 58 (2d Cir. 1980); *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d at 1292.

In this case, Shop & Save admits that no agreement was reached on Pneumo's January 24 offer which provided for a variable rent depending upon the level of Shop & Save's wholesale grocery purchases from Cross.[4] Shop & Save asserts, however, that it has been forced to pay a penalty rent for the Lyndonville property. Shop & Save alleges that Pneumo's exaction of this penalty rent constitutes an illegal tying arrangement. We disagree.

As stated above, a tying arrangement cannot exist unless the buyer was actually coerced by the seller into agreeing to buy the tied product or to refrain from purchasing the tied product from the seller's competitors. *Northern Pacific Railroad Co.* v. *United States*, 356 U.S. at 5-6; *Unijax, Inc.* v. *Champion International, Inc.*, slip op. 3426-27; *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d at 662-63; *Hill* v. *A-T-O, Inc.*, 535 F.2d at 1355. Absent this showing, there is lacking a definite nexus between the tying and the tied markets from which to

[4] We express no opinion on whether an unlawful tying arrangement would have existed had an agreement been reached on the January 24 offer.

conclude that the seller's exercise of economic power in the tying market will "always or almost always tend to restrict competition and decrease output," *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 19-20 (1979), in the tied market. For example, in the present case, even if Shop & Save has to pay a "penalty" for the tying product, Shop & Save is free to purchase and in fact admits that it does purchase its wholesale groceries from competitors of Cross. Accordingly, because the seller is unable to use his power or leverage in the tying market to deny his competitors free access to the tied market, *see Northern Pacific Railway Co.* v. *United States*, 356 U.S. at 6, an attempt to force a tie which results only in an agreement to pay a higher price for the tying product is not a tying violation.[5]

In deciding whether to invoke the *per se* rule, we must be cognizant of the teachings of the Supreme Court that "easy labels do not always supply ready answers[,]" *Broadcast Music, Inc.* v. *CBS*, 441 U.S. at 8, and that "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act[,]" *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972). The alleged unlawful conduct in this case may well give rise to a cause

---

5 As stated by this Court:

> Tying arrangements are abhorred by the courts primarily because they foreclose a substantial quantity of business to competitors and extend preexisting economic power to new markets for no good justification . . . . Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie.

American Mfrs. Mut. Ins. Co. v. *American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971) (citation omitted), *cert. denied*, 404 U.S. 1063 (1972).

of action. However, it does not constitute a *per se* illegal tying arrangement. Neither does it constitute a *per se* illegal group boycott or concerted refusal to deal, for the reasons spelled out in Judge Coffrin's opinion below, J. App. at 212-231.

Affirmed.

FEINBERG, *Chief Judge*, (concurring):

I concur in the result reached by the majority, but I would like to add a few words to recount the history of this case in this court.

The appeal was argued on October 9, 1981 and, by opinion dated January 20, 1982, a divided panel affirmed the district court on the group boycott and concerted refusal to deal issues, but reversed and remanded on the tying claim. The majority recognized that a penalty rent could have as strong an adverse effect on Shop & Save's ability to compete as a forced purchase of groceries from Cross. Accordingly, over a strong dissent by Judge Meskill, we held that a penalty rent should be treated as the equivalent of a tie-in and should be condemned if the trial court found that the other factors for finding a tying violation were present. There then occurred the rare event of a successful petition for rehearing.

The tie-in field, like much of antitrust law, rests on certain economic assumptions that are coming under increased scrutiny, see, e.g., R. Bork, The Antitrust Paradox 365-81 (1978). I concur in the changed result reached by the new majority because I agree that in view of the present case law and the current learning, it would be unjustifiable to extend the law regarding tying to the fact pattern presented here. Penalties exacted for the

privilege of buying one product rather than two have been mentioned tangentially at least twice before, and on neither occasion was the practice condemned under the antitrust laws, see International Business Machines Corp. v. United States, 298 U.S. 131, 134 & 139 (1936) (15% increase in rental for release from condition that lessee buy tabulating cards only from lessor); SmithKline Corp. v. Eli Lilly & Co., 427 F.Supp. 1089, 1110-14 (E.D. Pa. 1976), aff'd on other grounds, 575 F.2d 1056, 1061 & n.3 (3d Cir.), cert. denied, 439 U.S. 838 (1978) (loss of 3% bonus rebate for failure to buy minimum amounts of three products). But cf. United States v. Loew's, Inc., 371 U.S. 38 (1962) (remedial decree forbade non-cost-justified differential between cost of single film and package. But this relief cannot, under our decision in American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1136-37 (2d Cir. 1971), cert. denied, 404 U.S. 1063 (1972), be relied on to determine the elements necessary to prove an illegal tie). I therefore agree with the district court and with the majority in the conclusion that there was no antitrust violation in this case.

Office - Supreme Court, U.S.
FILED
OCT 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-550

In the Supreme Court of the United States

October Term, 1982

SHOP & SAVE FOOD MARKETS, INC.,
Petitioner,

vs.

PNEUMO CORPORATION, ABBOTT REALTY COMPANY AND P & C FOOD MARKETS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(DOCKET NO. 80-9053)

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

LESLIE W. JACOBS
(Counsel of Record)
CHARLES L. FREED
NEIL J. WILKOF
THOMPSON, HINE AND FLORY
1100 National City Bank Building
Cleveland, Ohio 44114
(216) 566-5500

JOSEPH E. FRANK
PAUL, FRANK & COLLINS, INC.
110 Main Street
P.O. Box 527
Burlington, Vermont 05402
Attorneys for Respondents

Of Counsel:
FRANCIS D. PRICE, JR.
P & C FOOD MARKETS, INC.
P.O. Box 1365
Syracuse, New York 13201

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0667

QUESTION PRESENTED

Whether the lease of a single property at market rent constitutes an unlawful restraint of trade under Section 1 of the Sherman Act merely because the lessor previously had offered to lease the same property at a lower rate in connection with the purchase of a second item.

TABLE OF CONTENTS

Question Presented I
Table of Authorities III
Statement of the Case 1
A. Nature of the Case and Course of Proceedings Below 1
B. Statement of Facts 4
Summary of Argument 4
Argument 5
The Petition Should Be Denied Since the Opinions Below Correctly Recognized That Petitioner Has Failed to Allege Any Facts That Could Give Rise to Injury or a Restraint of Trade 5
A. Petitioner's claim of a penalty rent states an economic impossibility 6
B. The lower courts' rejection of Petitioner's theory that Respondents' conduct is a *per se* violation of Section 1 of the Sherman Act was correct and consistent with all precedents 9
Conclusion 14

TABLE OF AUTHORITIES

Cases

American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972) 12

Associated Press v. United States, 326 U.S. 1 (1945) 12, 13

Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) 10

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 10

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 10, 13

Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914) 13

Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 13

Kypta v. McDonald's Corp., 1982-1 Trade Cas. ¶64,637 (11th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3225 (U.S. Oct. 4, 1982) 8

Northern Pacific Ry. v. United States, 356 U.S. 1 (1958) 7

SmithKline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089 (E.D. Pa. 1976), *aff'd on other grounds*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978) 8

United States v. Loew's, Inc., 189 F. Supp. 373 (S.D. N.Y. 1960), *vacated and remanded*, 371 U.S. 38 (1962) 12

United States v. Westinghouse Electric Corp., 471 F. Supp. 532 (N.D. Cal. 1978) 8

Statutes

Clayton Act (15 U.S.C. §§14, 15) 2
Section 3 2
Section 4 3
Sherman Act (15 U.S.C. §§1, 2) 2, 10, 14
Section 1 ..... 2, 3, 4, 5, 9, 12, 13
Section 2 ..... 2, 3, 6
Vermont Consumer Fraud Act (9 Vermont Statutes Annotated §§2451 *et seq.*) 2, 3

No. 82-550

In the Supreme Court of the United States

October Term, 1982

SHOP & SAVE FOOD MARKETS, INC.,
Petitioner,

vs.

PNEUMO CORPORATION, ABBOTT REALTY COMPANY AND P & C FOOD MARKETS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(DOCKET NO. 80-9053)

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

Petitioner, Shop & Save Food Markets, Inc., initiated this action against Respondents, Pneumo Corporation ("Pneumo"), Abbott Realty Corporation ("Abbott") and P & C Food Markets, Inc. ("P & C"), by filing a complaint on February 22, 1978.

Petitioner is a Vermont corporation that operates retail grocery stores in St. Johnsbury, Derby and Lyndonville, Vermont. P & C is a New York corporation that

operates a chain of retail grocery stores in Vermont and four other states; P & C is a subsidiary of Pneumo. Abbott, which was acquired by Pneumo in 1972, manages certain real property on behalf of Pneumo. Cross Company ("Cross"), which was identified in the Complaint but not named as a separate defendant, was also acquired by Pneumo in 1972 and distributes grocery products at wholesale.

Petitioner's complaint asserted claims under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), Section 3 of the Clayton Act (15 U.S.C. §14) and the Vermont Consumer Fraud Act (9 Vermont Statutes Annotated §§2451 *et seq.*). The claims arose out of a lease entered into between Petitioner and Abbott on October 13, 1977 for a supermarket facility located in Lyndonville, Vermont (the "Lyndonville store") and the negotiations leading to the execution of that lease. Specifically, Petitioner averred that the Respondents, all of whom are related through Pneumo's common ownership, combined and conspired to restrain trade by: (1) engaging in a tying agreement and/or attempting to impose a tying agreement on Petitioner and (2) engaging in a concerted refusal to deal and/or attempting to coerce Petitioner into a concerted refusal to deal. Those claims were predicated on Petitioner's allegation that Respondents had intended to condition the grant of a lease for the Lyndonville store on the requirement that Petitioner purchase its grocery inventory at wholesale from Cross.

On September 19, 1978, after the completion of initial discovery, Respondents moved for judgment on the pleadings or for summary judgment on Petitioner's federal antitrust claims. In response to this motion Petitioner voluntarily abandoned its claim under Section 3 of the Clayton Act.

On July 22, 1980 the district court granted summary judgment to Respondents on Petitioner's Section 1 Sherman Act claims (*see* Item 1 in the Appendix to the Petition). In addition, the district court granted summary judgment to Respondents on Petitioner's Section 2 Sherman Act claims insofar as they related to the wholesale grocery business. The court, however, reserved judgment for 90 days on Petitioner's Section 2 Sherman Act claims relating to the retail grocery business in order to permit Petitioner to conduct additional discovery. The court similarly reserved judgment on Respondents' separate motion to dismiss the Vermont Consumer Fraud Act claim.

Petitioner informed the district court on October 2, 1980 that it did not intend to conduct any additional discovery on the surviving Section 2 Sherman Act claim, and that claim was then dismissed by the district court. The Vermont Consumer Fraud Act claim was also dismissed for lack of continuing pendent jurisdiction.

Petitioner then appealed to the United States Court of Appeals for the Second Circuit *only* on the issue of whether the district court properly granted summary judgment to Respondents on the Section 1 Sherman Act claim. On January 20, 1982 the court of appeals (Judge Meskill dissenting) reversed the district court with respect to Petitioner's "tying" claim. In so holding, the court (Palmieri, J.), acknowledging its novel approach to be unprecedented, concluded that the facts alleged by Petitioner stated a cause of action for an unsuccessful tying agreement and remanded the case to the district court.

On July 2, 1982, after granting Respondents' Petition for Rehearing, the court of appeals withdrew its original opinion and affirmed Judge Coffrin's decision, holding that "an attempt to force a tie which results only in an agreement to pay a higher price for the tying product is not a tying violation" or an unlawful boycott. *See* Item 4 in the Appendix to the Petition at A43.

B. Statement of Facts

The facts were succinctly set forth in the district court's Opinion and Order (Appendix to the Petition at A3-4) and the opinion of the court of appeals (Appendix to the Petition at A38-40). Although Petitioner seeks review of an opinion affirming summary judgment for Respondents, the relevant and undisputed facts are few and dispositive of Petitioner's claim:

1. Respondents offered Petitioner a 12-year sublease of the Lyndonville store with no provision that Petitioner must purchase its groceries at wholesale from Cross, or must refrain from purchasing groceries at wholesale from any other supplier.

2. This offer was accepted "unconditionally" by Petitioner on May 5, 1977.

3. Since May 5, 1977 Petitioner has continued to occupy the Lyndonville store pursuant to a new 12-year sublease and has purchased virtually all of its grocery inventory from sources other than Cross.

SUMMARY OF ARGUMENT

Respondents oppose the Petition for Certiorari because the decision by the United States Court of Appeals for the Second Circuit affirming summary judgment for Respondents is totally consistent with well-recognized principles of federal antitrust law announced by this Court and by the lower courts. The Petition is predicated on a fanciful view of economic injury and a fundamental misunderstanding of both the purpose and operation of the antitrust laws. Petitioner has attempted to force an ordinary commercial dispute into the framework of a claim under Section 1 of the Sherman Act.

Both the court of appeals and the district court recognized that the facts alleged by Petitioner fail to state a cognizable tie-in or boycott claim. Further, both courts recognized that the facts alleged by Petitioner, when viewed in the light most favorable to it, fail to present any plausible possibility of a restraint of trade, the gravamen of any claim under Section 1 of the Sherman Act.

ARGUMENT

The Petition Should Be Denied Since the Opinions Below Correctly Recognized That Petitioner Has Failed to Allege Any Facts That Could Give Rise to Injury or a Restraint of Trade.

Throughout the course of this litigation, Petitioner has sought in vain for an antitrust theory that can support a claim for damages arising out of an ordinary commercial transaction. For purposes of its Petition for Certiorari, it appears that Petitioner has settled on the following theory:

> Since it would be illegal under Section 1 of the Sherman Act to engage in a tying agreement or boycott, surely it is illegal under Section 1 of the Sherman Act to penalize a person for failing to submit to a tying agreement or boycott.

In other words, Petitioner is asking this Court to give recognition to a completely new cause of action under Section 1, *viz.*, an unsuccessful attempted tie-in or boycott. There is no economic or legal basis for this position. And even should such a theory be viable in the abstract, the "penalty" identified by the Petitioner in its allegations, namely a price differential for a tying item offered alone in excess of its stated cost as part of a tied package, cannot constitute economic injury.

A. Petitioner's claim of a penalty rent states an economic impossibility.

Petitioner's entire antitrust theory is predicated upon the notion that it was required to pay a "penalty rent" because of its refusal to accede to a tying agreement or group boycott. Petitioner's antitrust claim must fail because the notion that a penalty was extracted is wrong as a matter of simple, but incontrovertible, economics.

This case arises from Petitioner's apparent dissatisfaction with the rental terms of its sublease. It found itself in the common situation of many lessees who, upon expiration of their leases, are faced with the unpleasant reality that continued occupancy will cost more than they had previously paid. But in these circumstances neither Petitioner nor any other tenant would agree to pay rent in excess of the market value.[1] Thus, Petitioner could suffer no injury.

Petitioner contends that it was offered a more favorable rental if it would agree to purchase wholesale groceries from an affiliate of the Respondents; because it refused this arrangement, it was then offered the store location only at a higher rent. That rental differential is alleged to be the injury it incurred. Petitioner would measure market value not from the price that an item can command standing alone but, rather, from its lower price as part of a package transaction. This ironic proposition would stand tying law on its head.

The very factor that makes coerced tying unlawful is the inevitable transfer by a seller of part of the value of

---

1. Petitioner voluntarily abandoned its claim under Section 2 of the Sherman Act. Thus, issues relating to abuse of monopoly power were not before the court of appeals and are not before this Court.

the tying item, in which the seller has market power, to the tied item. As a result, in a tying agreement the price attributed to the tying item, when sold as part of a package, cannot be the full market price that the tying item would ordinarily command if sold alone, because some of its value is reflected in the price of the tied item. Thus, a buyer will agree to pay more than he otherwise would for the tied item because that purchase carries with it the opportunity to acquire the tying item for less that it would otherwise cost. The evil of this transfer of value is that competition is restrained in the market for the tied item because of market power, or a monopoly position, that a seller has in another market.[2]

Therefore, in the *absence* of a two-product tie, as in *any* ordinary single product commercial transaction, the price or rental amount of an item standing alone necessarily represents its arm's-length value, or a buyer would not agree to pay it. There is *no* transfer of value from a "tying" to a "tied" product. The price for the item standing alone automatically constitutes the full market price of the item.

Contrary to Petitioner's assertion that a price differential for an item itself constitutes an illegal tie-in, there has been unanimous agreement among the courts that an unlawful tie-in cannot arise if the tying item is offered sep-

---

2. This Court condemned tying in *Northern Pacific Ry. v. United States*, 356 U.S. 1, 6 (1958), precisely because it reflected the seller's use "of his power or leverage in another market". At the same time the Court noted (*id.* at 6 n.4) the economic truism that Petitioner has chosen to ignore:

> Of course, where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.

The absence of any use of leverage between markets is all the more obvious when the seller offers no package at all, as ultimately was the case here.

arately—even though it is offered at a higher price than the same product is offered as a part of a package.[3] These decisions presaged the specific economic analysis applied by the court of appeals in *Kypta v. McDonald's Corp.*, 1982-1 Trade Cas. ¶64,637 (11th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3225 (U.S. Oct. 4, 1982).

As stated in Judge Feinberg's concurring opinion on the rehearing of this case (Appendix to the Petition at A44-45):

> Penalties exacted for the privilege of buying one product rather than two have been mentioned tangentially at least twice before, and on neither occasion was the practice condemned under the antitrust laws, see International Business Machines Corp. v. United States, 298 U.S. 131, 134 & 139 (1936) (15% increase in rental for release from condition that lessee buy tabulating cards only from lessor); SmithKline Corp. v. Eli Lilly & Co. 427 F.Supp. 1089, 1110-14 (E.D. Pa. 1976), aff'd on other grounds, 575 F.2d 1056, 1061 & n.3 (3d Cir.), cert. denied, 439 U.S. 838 (1978) (loss of 3% bonus rebate for failure to buy minimum amounts of three products). But cf. United States v. Loew's, Inc., 371 U.S. 38 (1961) (remedial decree forbade non-cost-justified differential between cost of single film and package. But this relief cannot, under our decision in American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1136-37 (2d Cir. 1971), cert. denied, 404 U.S. 1063 (1972), be relied on to determine the elements necessary to prove an illegal tie).

---

3. *See, e.g., SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089 (E.D. Pa. 1976), *aff'd on other grounds*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978); *United States v. Westinghouse Electric Corp.*, 471 F. Supp. 532 (N.D. Cal. 1978).

In the present case, Petitioner was offered a sublease of the supermarket premises alone. The Petitioner accepted the sublease offer at the rent demanded by the Respondents. If Petitioner now thinks that the rent is excessive, it simply made a bad economic choice in accepting the offer, but obviously it has not been injured by any restraint of trade. Having been charged an arm's-length rent in a single, non-tying transaction, Petitioner wants this Court now to require the lesser rental charge that allegedly could have been obtained had the sublease been part of a package transaction. A more misguided view of the antitrust laws would be difficult to imagine.

B. The lower courts' rejection of Petitioner's theory that Respondents' conduct is a per se violation of Section 1 of the Sherman Act was correct and consistent with all precedents.

Not only is Petitioner's entire case based on an economic impossibility—the so-called "penalty rent"—but Petitioner then attempts to utilize its flawed notion of a penalty as the basis for extending the scope of Section 1 of the Sherman Act beyond all established case law.

Both the district court and the court of appeals recognized that an attempted tie-in or boycott does not have the anticompetitive effects associated with a completed tie-in or boycott. Indeed, Petitioner implicitly acknowledges that its alleged injury does not arise out of a restraint of trade (Petition at 37):

> The test, from the Petitioner's standpoint, was whether it was injured as a result of conduct recognized as per se illegal, and not whether the Petitioner might fall within an improbable statistical minority whose injury comes about in a manner that arguably does not restrain trade.

It should be obvious that an antitrust claim cannot succeed in the absence of an unreasonable restraint of trade, *i.e.*, an anticompetitive effect. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *see also, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Under the most generous interpretation, the facts alleged by Petitioner fail to disclose any conduct by Respondents that unreasonably restrained trade.

Petitioner argues that since tying agreements and boycotts are evaluated under a *per se* standard, conduct which penalizes Petitioner for refusing to agree to a tying agreement or boycott must also be evaluated under the *per se* rule (Petition at 30-37). In so arguing, Petitioner is attempting to exploit the application of the *per se* rule in such a way so as to eliminate the need for this Court to consider whether the conduct alleged could have any possible anticompetitive effect. The technique, which was at first adopted and then rejected by the court of appeals, is to recast Respondents' conduct as the functional "equivalent" of a tying agreement or boycott, both of which are traditionally subject to *per se* treatment under the Sherman Act. This will not do. Judicially-created *per se* rules have been established for certain conduct because experience has shown that such conduct is virtually certain to have anticompetitive effects. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). The conduct under scrutiny here does not fall within these stringent, narrow requirements.

This Court, in *Broadcast Music, Inc. v. CBS*, *supra*, counseled caution in choosing whether to designate conduct as *per se* illegal (*id.* at 18-19, emphasis added):

> Our inquiry must focus on . . . whether the practice *facially appears* to be one that *would always or almost always* tend to restrict competition or decrease output . . . .

Upon rehearing of this case in the Second Circuit, the court unequivocally rejected the notion that a so-called "penalty rent" constitutes the type of inevitable restraint of trade which invites application of a *per se* rule. It stated (Appendix to the Petition at A43, emphasis added):

> . . . [I]n the present case, even if Shop & Save has to pay a "penalty" for the tying product, Shop & Save is free to purchase and in fact admits that it does purchase its wholesale groceries from competitors of Cross. Accordingly, because the seller is unable to use his power or leverage in the tying market to deny his competitors free access to the tied market, see Northern Pacific Railway Co. v. United States, 356 U.S. at 6, *an attempt to force a tie which results only in an agreement to pay a higher price for the tying product is not a tying violation.*[5]
>
> • • • • •
>
> [5]As stated by this Court:
>
> > Tying arrangements are abhorred by the Courts primarily because they foreclose a substantial quantity of business to competitors and extend preexisting economic powers to new markets for no good justification . . . . *Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie.*
>
> *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971) (citation omitted), *cert. denied*, 404 U.S. 1963 (1972).

Despite Petitioner's lengthy discussion of a wide-ranging array of cases, it has failed to show why the courts

below erred in refusing to find a *per se* violation of the antitrust laws. The only consequence of Respondents' conduct alleged by Petitioner was the exaction of the so-called "penalty rent." We have demonstrated that this concept is an economic impossibility. No other anticompetitive effects were alleged or can be conceived. Therefore, there is no basis whatsoever for applying the *per se* rule to (or, indeed, finding any basis for a violation with respect to) the conduct in question.

Petitioner's reliance on *United States v. Loew's Inc.*, 189 F. Supp. 373 (S.D.N.Y. 1960), *vacated and remanded*, 371 U.S. 38 (1962), to support the proposition that price differentials alone can be the equivalent of tying agreements, and subject to adjudication under the *per se* standard, is mistaken. Petitioner relies on the language of a remedial decree which was entered *after* the court had found an *actual tying agreement* with all of the attendant anticompetitive effects. The terms of the decree fashioned by the district court and this Court cannot, therefore, be interpreted as the standard for identifying unlawful behavior, much less the basis for designation of antitrust conduct subject to a *per se* analysis. Indeed, the court of appeals has explicitly warned against relying on the remedy decreed in *Loew's* as a basis for determining what constitutes an unlawful tie. *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1136-37 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

Equally inappropriate is Petitioner's reliance on this Court's opinion in *Associated Press v. United States*, 326 U.S. 1 (1945) to support its contention that when a party receives some form of payment to compensate it for the loss of an anticompetitive benefit, a violation of Section 1 of the Sherman Act is stated (Petition at 32-35). In *Associated Press*, this Court found a myriad of elements

in the by-laws of Associated Press that did, in fact, restrain trade or inevitably would have done so (326 U.S. at 12).[4] Thus, contrary to Petitioner's misreading of the case, the Court did *not* find that Associated Press violated Section 1 of the Sherman Act because certain of its members received compensation *in lieu* of the benefits of a restraint of trade.

Similarly, the boycott cases cited by Petitioner do not advance its dubious legal theory that *conduct alone* can violate Section 1 of the Sherman Act without a showing that the conduct restrained trade. In each of these cases, coercive conduct was significant because it was the means used to effectuate an actual restraint. In *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the plaintiff could not, in fact, purchase products because it was being boycotted. In *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), an injunction action, this Court found that the defendant's publication of a list of wholesalers who conducted retail business was designed to cause retailers to stop dealing with such wholesalers—a clear restraint of trade. Neither of these situations is analogous to the instant facts.

In a last gasp attempt to save its Petition, Petitioner urges remand of this action at least to evaluate Respondents' conduct under the "rule of reason" standard. Petition at 46. But liability under the rule of reason also requires proof of a restraint of trade, and a private cause of action requires injury. As Respondents have already

---

4. In *Associated Press, supra*, the United States sought injunctive relief against Associated Press and its members. The Court concluded that the government could obtain injunctive relief, even if the conspiracy to restrain trade had not yet resulted in an actual restraint, so long as the inevitable result of the conspiracy would be to restrain competition. In light of the Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, it is unlikely that a private plaintiff seeking damages under Section 4 of the Clayton Act would have standing to assert such a claim.

demonstrated, Petitioner has pointed to no set of facts that amounts to either any restraint of trade or injury to Petitioner. Accordingly, there is simply no basis for remand of this case for a rule of reason analysis, and the court of appeals was correct in dispensing with a discussion of it.

CONCLUSION

Having failed to demonstrate any basis for its allegation of a restraint of trade, Petitioner's attempt to establish liability under the Sherman Act was properly rejected. The allegation of injury from submission to a penalty rent is spurious on its face. Petitioner has stated no set of facts that supports the designation of an attempted tie-in or boycott as a *per se* violation of the Sherman Act. This Court should deny the Petition for Certiorari.

LESLIE W. JACOBS
(Counsel of Record)
CHARLES L. FREED
NEIL J. WILKOF
THOMPSON, HINE AND FLORY
1100 National City Bank Building
Cleveland, Ohio 44114
(216) 566-5500

JOSEPH E. FRANK
PAUL, FRANK & COLLINS, INC.
110 Main Street
P.O. Box 527
Burlington, Vermont 05402
Attorneys for Respondents

Of Counsel:
FRANCIS D. PRICE, JR.
P & C FOOD MARKETS, INC.
P.O. Box 1365
Syracuse, New York 13201